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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1686

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT,
and
FARMINGTON LOCAL SCHOOL DISTRICT, *Petitioners*,

v.

STATE BOARD OF EDUCATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY, OHIO

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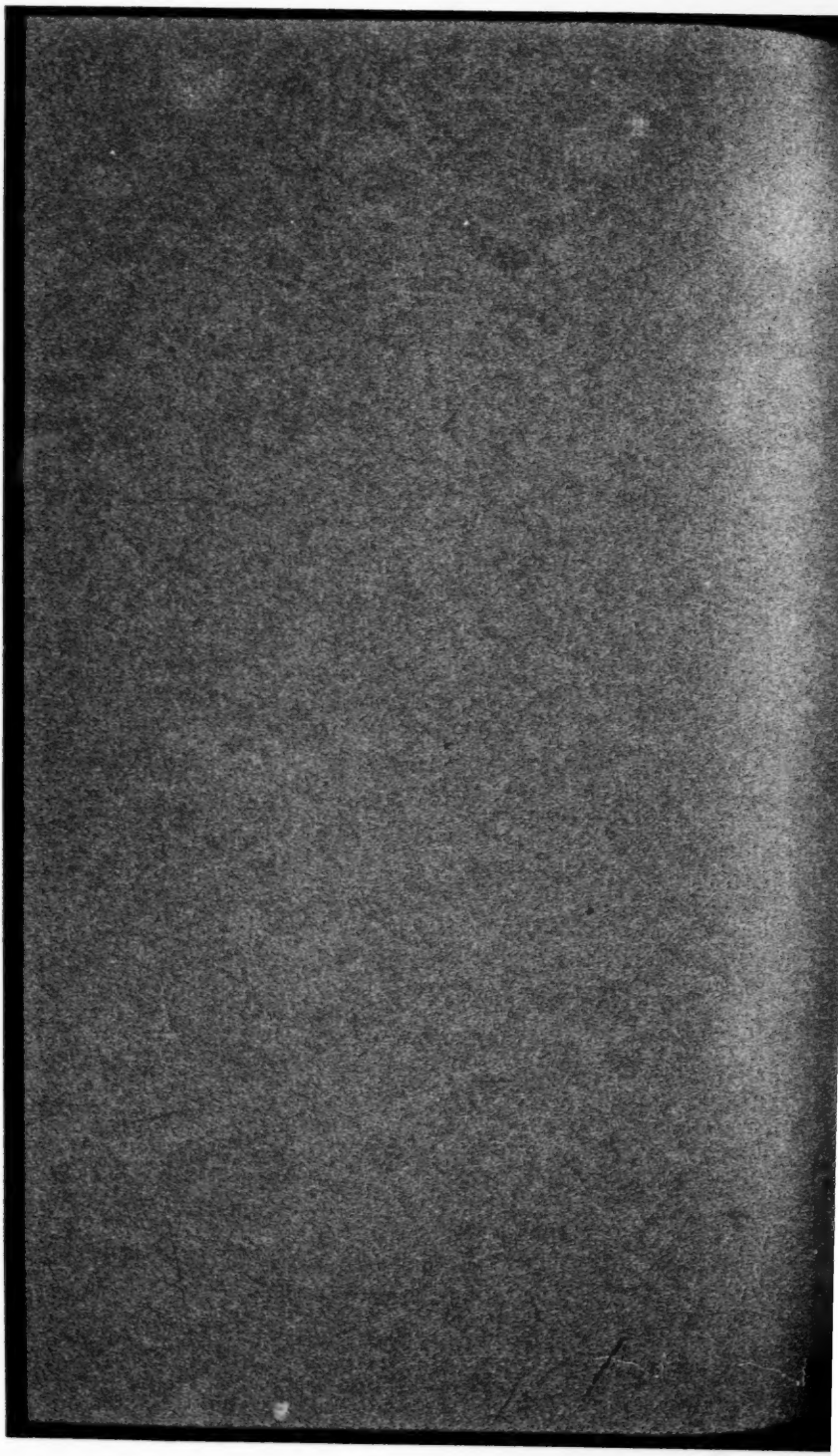
May 10, 1974



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Does the Due Process Clause of the Fourteenth Amendment require that the local school districts be given the opportunity during the administrative proceeding to adduce evidence as to the arbitrary nature of the proposed revocation, and of the application of the educational standards, where (a) the administrative agency is under a statutory mandate to revoke charters for non-compliance with the standards; and (b) no other forum is available for the meaningful presentation of such evidence?

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The petitioners, Bloomfield-Mespo Local School District and Farmington Local School District, respectfully request that a writ of certiorari issue to review the judgment and opinion entered in this proceeding by the Court of Appeals of Ohio, Eleventh Appellate District, Trumbull County, Ohio.

OPINIONS BELOW

The order of the Supreme Court of Ohio, dismissing the appeal, is unreported. It is reproduced in the appendix hereto, p. 1a, *infra.*

The opinion and journal entry of the Court of Appeals, Eleventh Appellate District, Trumbull County, Ohio, are not reported. They appear in the appendix hereto, pp. 2a, 7a, *infra*.

The unreported opinion of the Court of Common Pleas, Trumbull County, Ohio, is reproduced in the appendix hereto, p. 10a, *infra*.

The two unreported findings and recommendations of the Referee of the State Board of Education are reprinted at pp. 36a, 43a, *infra*.

JURISDICTION

Following administrative proceedings, the respondent State Board of Education, by resolutions adopted on June 14, 1971, revoked the charters of the two petitioners, Bloomfield-Mespo Local School District and Farmington Local School District, for failure to meet minimum standards for Ohio high schools set by the respondent Board. The petitioners filed appeals to the Court of Common Pleas, Trumbull County, Ohio, pursuant to the provisions of §119.12 of the Revised Code of Ohio, entitled the Administrative Procedure Act. The Court of Common Pleas cancelled and rescinded the orders revoking the charters.

The respondent Board then appealed the decision of the Court of Common Pleas. By a divided 2-1 vote, the Court of Appeals, Eleventh Appellate District, reversed the determination of the Court of Common Pleas. The opinion of the Court of Appeals was dated July 16, 1973, and the formal journal entry, embodying the judgment, was made on August 13, 1973. See p. 7a, *infra*.

The two petitioners thereafter sought to appeal the determination of the Court of Appeals to the Supreme

Court of Ohio, filing a detailed memorandum in support of claimed jurisdiction. On December 7, 1973, the Supreme Court of Ohio *sua sponte* entered an order dismissing the appeal "for the reason that no substantial constitutional question exists herein." See appendix hereto, p. 1a, *infra*. The cause was described in the order as being "here on appeal as of right."

Petitioners then sought and obtained leave from the Supreme Court of Ohio to file a motion for rehearing "out of rule," or out of time. The Supreme Court then considered the motion for rehearing on its merits, and on January 18, 1974, entered an order denying rehearing. See p. 1a, *infra*. It is well established, of course, that where a court allows the filing of an untimely petition for rehearing "and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940).[1]

On timely application, Mr. Justice Stewart on April 11, 1974, signed an order extending the time for filing this petition for writ of certiorari to and including May 11, 1974. This petition has been filed within that extended period.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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[1] It matters not what reason motivated the filing of a petition for rehearing out of time. Once leave is granted and the petition is entertained and denied on its merits, the 90-day period in which to file a petition for certiorari is calculated from the date of the rehearing denial. See Stern and Gressman, Supreme Court Practice, p. 249 (4th ed. 1969).

QUESTION PRESENTED

The charters of two local school districts in Ohio have been revoked for non-compliance with statewide minimum educational standards. The revocations followed judicial review and approval of an administrative proceeding in which the testimony and evidence were strictly limited to the issue of non-compliance. The question presented is:

Does the Due Process Clause of the Fourteenth Amendment require that the local school districts be given the opportunity during the administrative proceeding to adduce evidence as to the arbitrary nature of the proposed revocation, and of the application of the educational standards, where (a) the administrative agency is under a statutory mandate to revoke charters for non-compliance with the standards; and (b) no other forum is available for the meaningful presentation of such evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Code of Ohio, Section 119.12, Administrative Procedure Act:

"The court shall conduct a hearing on such appeal and shall give preference to all proceedings under Sections 119.01 to 119.13, inclusive, of the Revised

Code, over all other civil cases , irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

"The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal."

Revised Code of Ohio, Section 3301.07:

"D. It [the State Board of Education] shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality . . ."

Revised Code of Ohio, Section 3301.16:

Pursuant to standards prescribed by the state board of education as provided in paragraph D of section 3301.07 of the Revised Code, such board shall classify

and charter school districts and individual schools within each district. Such board shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board. In the issuance and revocation of school district or school charters, the state board of education shall be governed by the provisions of Chapter 119, of the Revised Code. In case a school district charter is revoked pursuant to this section, the state board of education may dissolve the school district and transfer its territory to one or more adjacent districts . . . ."

STATEMENT OF THE CASE

A. The administrative proceedings

The antecedents of these proceedings occurred in 1963. At that time, following a one-day examination of the schools by an inspector (one Doyle Shumaker), the State Board of Education sought to revoke the charters of three school districts in Trumbul County, Ohio, for non-compliance with certain minimum standards established in 1957 for Ohio high schools. One of those three was the petitioner Farmington Local School District.

Upon judicial review, the Ohio courts cancelled and rescinded the State Board's revocation orders. The 1957 standards were found to be unreasonable on their face, the evidence showing that only 1.2% of the Ohio schools were able to meet the standards. Many of the alleged inadequacies were found to be "petty" and "arbitrary." It was further found that the standards had not been reasonably applied to the three school districts in question, particularly since the State Board had given no consideration to the effect of revocation or

to the fact that no reasonable alternative to continuance of the school districts had been found. *Bristol Local School District* v. *Board of Education,* Court of Appeals, Eleventh Appellate District, Nos. 1669-1671 (June 16, 1966).[2]

Thereafter, in 1969, the State Board sent a representative, Mr. David Rossi, to make a detailed examination of the school districts and educational problems in the northern part of Trumbull County, which contains the two petitioning school districts. After a seven-month endeavor, Mr. Rossi and certain local school officials formulated a plan for consolidating all the 15 school districts in the northern part of the county. The plan, which received the approval of 14 of the 15 school districts, called for additional local taxes of $4,600,000 and a contribution of $5,800,000 from state funds. The plan was formally submitted to the State Board, both orally and in writing, but no response ever came forth from the State Board other than a verbal suggestion that Mr. Rossi refine the plan. Mr. Rossi left his employment with the State Board in 1970.

In March of 1971, the State Board again sent in their 1963 inspector, Doyle Shumaker, for a day and a half review of the petitioning local school districts. Disregarding the studies and efforts of Mr. Rossi, Mr. Shumaker concluded that the districts were not in compliance with the state standards, which had been revised and up-graded in 1968, and that the districts should be discontinued.

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[2] The opinion of the Court of Appeals in the *Bristol* case is unreported. But pertinent extracts are contained in the opinion of the Court of Common Pleas in the instant proceedings. See pp. 23a-24a, 26a-32a, *infra*.

Pursuant to the Ohio Administrative Procedure Act, hearings were then had before a referee of the State Board. In his opening statement, counsel for the two petitioning school districts conceded that not all of the 1968 standards had been met. He made it plain, however, that "we contend that the standards are unreasonable and that the standards are unreasonably applied" and that "it will be to that that we will direct our evidence and our attention in the presentation of our case." Bloomfield-Mespo Tr. 1-2; see also Farmington Tr. 1.

Counsel for the State Board objected to that approach, stating that "our position is that this is a hearing to determine whether or not violations have occurred and whether or not there is evidence to support these violations." Bloomfield-Mespo Tr. 23. The referee conducting the hearings agreed that the sole purpose of the proceedings was to determine if the school districts were in compliance with the standards and, if not, to make recommendations accordingly. *Ibid.* All attempts to introduce or elicit testimony that the state standards were unreasonable or had been unreasonably applied to these two school districts were rejected by the referee, on objections by counsel for the State Board.

As the referee later stated in his findings (see pp. 38a, 44a, *infra*), his basic position was that (1) the establishment and promulgation of the standards by the State Board amounted to "a finding by such Board that the standards are reasonable," (2) for the purposes of the hearings, the referee was bound by such previous determinations of the Board, and (3) consequently it was not the function of the referee to pass upon any legal question as to the reasonableness of the

standards as promulgated or the reasonableness of their application. The referee's function, in other words, was said by him to be "confined to the factual determination as to whether or not the standards have been violated and the legal determination as to whether or not upon such factual findings the State Board has the power and authority to revoke the charter of the District involved."

As thus limited, the hearings produced testimony that showed that the Bloomfield-Mespo District was in violation of 46 of the minimum standards promulgated in 1968 by the State Board, and that the Farmington District was in violation of 43 of those standards. Neither District materially contested or disputed such testimony, which was otherwise substantiated through documents.

During the hearings, the referee sustained all objections to the Districts' attempts to show that the State Board had no alternative method for providing education to the children in the two Districts should the revocation orders stand. Questions dealing with the lack of alternatives, however, were allowed "for the very limited purpose of testing the credibility of the witness." See p. 14a, *infra*. But the referee indicated that he had no authority otherwise to consider the matter of alternatives.

Throughout the hearings, on both direct and cross-examination, counsel for the two Districts sought to elicit testimony to the effect that there were many other schools in Trumbull County and throughout Ohio that presently were not in compliance with the 1968 school standards. Counsel also sought to elicit evidence as to the proposed consolidation plan that had been sub-

mitted to the State Board in 1969, following the prolonged investigation by David Rossi. The referee, however, "did not consider that such evidence was material to the issues involved in this proceeding." See pp. 38a, 45a, *infra*. Thus all objections to such questions were sustained.

But, at the same time, the referee felt that counsel for the two Districts was entitled, under the Ohio Administrative Procedure Act (Sec. 119.09), to make a proffer of such evidence "for record purposes." See pp. 38a, 45a, *infra*. But such proffers were limited to direct examination of the Districts' witnesses, the proffers being denied as to cross-examination of the State Board's witnesses. Thus were produced the following illustrative forms of testimony:

1. Cross-examination of John E. Brown, Director of Elementary and Secondary Education for the Ohio Department of Education, Bloomfield-Mespo Tr. 28-29:

> Q. What do you propose to do, when this charter is revoked in June, for educating these youngsters in the Bloomfield-Mespo School District?
>
> MR. HOGUET [counsel for State Board]: I am going to object again.
>
> THE REFEREE: I will sustain the objection.
>
> MR. GRIFFITH [counsel for the Districts]: I will proffer the answer, that they have no solution.
>
> * * * *
>
> THE REFEREE: There is no proffer on cross examination, but I presume that is your argument.
>
> MR. GRIFFITH: Yes.
>
> * * * *
>
> Q. Mr. Brown, do I understand that you have custody of all school principals' reports for the twelve hundred schools in the state . . . ?
>
> A. That is true.

Q. Would you know how many schools in the State of Ohio meet the standards as established by the State Board of Education?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

Q. Certainly very few of the schools in the State of Ohio meet the standards as provided by the State Board of Education in 1968, is that true?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

Q. Do you know of any schools in the entire State of Ohio that meet the minimum standards for Ohio schools as established by the State Board of Education in 1968?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

2. Direct examination of Local Superintendent Cristo of the Bloomfield-Mespo District, Bloomfield-Mespo Tr. 1111:

Q. As Superintendent of the Bloomfield-Mespo School District, have you given some thought to possibly consolidating alternatives to the existing school districts?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

MR. GRIFFITH: I will proffer the answer yes.

Q. Do you know of any consolidation that would be feasible, other than the plan proposed [in 1969] and marked Respondent's Exhibit A?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

MR. GRIFFITH: I will proffer the answer no.

3. Direct examination of Trumbull County Superintendent George Morar, Jr., Bloomfield-Mespo Tr. 128-129, 139:

Q. Do you know, as Superintendent of the Trumbull County Board of Education, of any al-

ternatives for educating the students of the Bloomfield-Mespo School District, if the school there is discontinued, that would conform to state standards?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

MR. GRIFFITH: I will proffer the answer there is none.

* * * *

Q. Are there any schools under your jurisdiction that does [sic] meet all of the state standards?

A. No.

4. Direct examination of Trumbull County Superintendent George Morar, Jr., Farmington Tr. 88, 91, 100:

Q. In realizing they do not [meet state standards], have you made any attempt to find solutions to provide the education as set out in those standards?

MR. HOGUET: Objection. . . .

THE REFEREE: I will sustain the objection. . . .

MR. GRIFFITH: I proffer the answer yes, I have made considerable effort along these lines.

* * * *

Q. Was this plan submitted to the State Board of Education?

MR. HOGUET: Objection.

REFEREE: Sustained.

MR. GRIFFITH: I will proffer the answer yes.

* * * *

Q. Does any school in Trumbull County under your jurisdiction meet the standards of the State Board of Education?

MR. HOGUET: Objection.

THE REFEREE: Sustained.

MR. GRIFFITH: I will proffer the answer no.

5. Cross-examination of Doyle Shumaker, Chief of Secondary Section, Division of Elementary and Secondary Education, Farmington Tr. 76, 81:

> Q. Are there any schools in the State of Ohio that meet the standards that you have examined, that meet the standards of the State Board of Education as promulgated by them in 1968?
>
> MR. HOGUET: Objection.
>
> THE REFEREE: Sustained.
>
> * * * *
>
> Q. Do you have any alternatives or any plan as to whether these students would be educated in the event the school was discontinued or the charter revoked?
>
> MR. HOGUET: Objection.
>
> THE REFEREE: Sustained.

Following these hearings, the referee concluded, as a matter of law, that the State Board had the power and authority to revoke the two charters in question. And in both instances, he recommended that the charter be revoked for non-compliance with the state educational standards. See pp. 42a, 48a, *infra*. By resolutions dated June 14, 1971, the State Board approved the referee's recommendations and affirmed the revocation orders.

B. The judicial review proceedings

The two petitioning School Districts then filed appeals to the Court of Common Pleas for Trumbull County, Ohio, pursuant to Section 119.12 of the Revised Code of Ohio, the Administrative Procedure Act. The sole question before that court, according to the state law quoted in its opinion (see p. 11a, *infra*), was whether the State Board's orders were "supported by reliable, probative, and substantial evidence and is in

accordance with law." But the court did permit, during the hearing on the review of the State Board's orders, the submission of "newly discovered" testimony by David Rossi, who had been unavailable as a witness during the administrative proceedings.[3] His testimony, summarized at pp. 17a-18a, *infra,* indicated generally that revoking the charters of these two School Districts and consolidating them with other nearby districts, which themselves are not in compliance with state standards, would not result in any greater compliance with the standards than now achieved by the two Districts.

The Court of Common Pleas, after the hearing, issued a lengthy opinion holding that the State Board's revocation orders were not supported by reliable, probative and substantial evidence and hence should be cancelled. See pp. 10a-36a, *infra.* Specifically, the court ruled:

> (1) There was no substantial evidence in these proceedings that there were numerous violations of the standards by schools throughout Ohio. Hence the standards as promulgated could not be said to be unreasonable.

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[3] The Court found that Rossi's prior unavailability constituted "good cause" for the presentation of additional evidence before the court, pursuant to Section 119.12 of the Revised Code of Ohio. See p. 17a, *infra.*

The grounds for admitting such evidence are stated in § 119.12 of the Revised Code of Ohio as follows: "Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency."

(2) The record "is almost undisputed" that the two School Districts in question do not meet the minimum standards promulgated in 1968.

(3) The 1968 standards, however, were unreasonably applied "inasmuch as the State Board of Education has abused its discretion in not providing alternatives to the districts to assure the education of the youth of these districts after revocation." See p. 35a, *infra*.

The court rejected the State Board's argument that it had an absolute right to revoke a charter without offering any alternative means of education.[4] The court also noted the referee's exclusion of any evidence relative to alternatives except as it might relate to credibility.

The State Board duly noted an appeal to the Court of Appeals. By a 2-1 vote, the Court of Appeals reversed the judgment of the Court of Common Pleas. The Court of Appeals agreed that the 1968 minimum standards were reasonable and that the two School Districts were in non-compliance therewith. But its disagreement with the lower court was expressed in its holding that the State Board did not abuse its discretion in not providing alternatives to assure education of the youth in these Districts after revocation. In so ruling, the Court of Appeals conceded that "it would be an abuse of discretion not to apply the standards uniformly" throughout Ohio. See p. 5a, *infra*.

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[4] The Court noted that if the State Board later sought to revoke the charters and then provided specific alternatives, giving the Districts a reasonable time in which to choose an alternative, such revocation action would be upheld. See p. 35a, *infra*.

RAISING THE FEDERAL QUESTION

The federal constitutional question did not arise i this case until the Court of Appeals reversed the judg ment of the Court of Common Pleas. Then, for the firs time in Ohio jurisprudence, it became the law of Ohi that state school districts must have their charters re voked for failure to comply with state minimum edu cational standards after administrative hearings i which: (a) the sole issue is whether there has bee compliance or non-compliance with the standards; an (b) no opportunity is afforded the school districts t introduce evidence of the unreasonableness of the stand ards or of the unequal and arbitrary application o those standards.[5]

The petitioners could not have anticipated such result, at least in light of prior judicial rulings in Ohi Thus the first opportunity to complain of the federa constitutional consequences of such a ruling came o the appeal therefrom.

Petitioners promptly and appropriately raised th federal question in their appeal to the Supreme Cour of Ohio. In their Memorandum in support of the Su preme Court's jurisdiction over the appeal, the peti tioners claimed:

> (1) The denial of "the right to full cross-ex amination on all relevant matters in a hearing be fore an administrative agency deprives the [peti tioners] of the right guaranteed by the Fifth an Fourteenth Amendments to the United States Con stitution." Proposition of Law No. 3, pp. 17-20.

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[5] The prior Ohio law on the matter was reflected in *Bristol Loc School District* v. *Board of Education*, relied upon in the opini of the Court of Common Pleas in this case (see pp. 23a-24a, 26a-32 *infra*); the *Bristol* case indicated that such evidence of unreaso ableness and unequal application could be submitted and co sidered.

(2) The "equal protection of the laws required by the Fourteenth Amendment to the Constitution of the United States . . . is violated by the arbitrary promulgation of standards met by very few schools of the State of Ohio and the arbitrary revocation of charters of schools for failure to meet those standards without a hearing in regards to abuse of discretion or unreasonableness of the standards." Proposition of Law No. 4, pp. 21-23.

The Supreme Court considered and rejected these federal claims on their merits, finding no substance thereto; the court did not consider them as untimely raised.

REASONS FOR GRANTING THE WRIT

1. The impact of the federal Due Process Clause on the revocation of local school district charters is an important problem of nationwide scope.

This case presents a classic confrontation between a legitimate state interest and a constitutional due process command. As this Court noted in *Lemon* v. *Kurtzman,* 403 U.S. 602, 613 (1971), "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." On the other hand, when such a legitimate state concern looks toward the permanent cancellation of a school charter, the federal Due Process Clause would appear to give the school an opportunity to be heard in defense of its charter, "an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

The proper resolution of these competing demands is of concern to far more than two small school districts in Trumbull County, Ohio. Within the State of Ohio, at the present time, a concerted effort is being launched to reorganize and reduce the numbers of local school

districts, which now number over 600.[6] The aim is to compel, by various means, the discontinuance of the more than 290 Ohio school districts with pupil enrollments of less than 2000. Revocation of charters of small districts that do not comply with all the state educational standards is but one of the techniques to drive the smaller districts out of existence. The Bloomfield-Mespo District and the Farmington District, with 1972 enrollments of 628 and 426 respectively, are apparently the first targets of this type of assault on the smaller school districts in Ohio.

There are, of course, literally thousands of local school districts throughout the United States, many of them with enrollments under 2000. All of those districts, including all within Ohio, are affected by the potential of charter revocation, particularly as the forces of consolidation become more intense. And as charter revocation of small districts, premised on noncompliance with state educational standards, becomes a means for compelling consolidation into larger school districts, the smaller school districts throughout the nation will have an increasing concern with the due process problem here raised.

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[6] "The pattern of organization for Ohio's school districts has evolved without regard for an overall master plan for the state. While the number of districts in the state has been substantially reduced over the past decade (from 984 in the fall of 1959 to 631 in the fall of 1970), there are still more than 300 districts enrolling less than 2,000 pupils. . . . School district reorganization should be expedited through a mandate that provides for an orderly transition within a specified time. An increased state aid guarantee to reorganized districts could provide a fiscal incentive for reorganization." Ohio State Board of Education, Recommendations for Legislative Consideration, p. 7 (Dec. 14, 1970).

The Governor of Ohio, on April 19, 1971, stated: "A school district of less than 2000 students is too small for full funding and should be forced to consolidate."

This is not the forum or the time to evaluate the edutional merits of Ohio's program of eliminating school districts with less than 2000 students. Nor is this the place to put in issue the need for compelling the smaller school units to comply with the minimum educational standards promulgated for Ohio schools. Ohio is but one of the many states undergoing a prolonged internal debate over the best way to provide quality education in the light of available financial resources. The instant case involves one significant segment of that great debate that is truly nationwide in scope.[7]

But the very intensity and breadth of that debate lend certiorari significance to the constitutional due process problem herein presented. To the extent that this debate, or any part of it, is to be resolved through application of the administrative and judicial processes of the state, it becomes of critical public importance

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[7] The two petitioning rural School Districts reflect a strong community sentiment favoring local or decentralized schools, regardless of size, with emphasis on improving the quality of education offered by such local schools. That sentiment is best expressed by the remarks of Paul W. Taylor, entitled *A Case for Financing Small Schools in Ohio,* delivered at an educational conference in Columbus, Ohio, on April 19, 1971:

"In many rural communities the schools are the center of activity, much like a community center is in the city. . . . Many of us believe that we can do just as good, if not better, a job of humanizing education in the smaller schools. . . . If the problems are just as severe in a smaller school, then let's insist that more tax dollars be spent in smaller schools also . . . In summary, the threat of over 290 smaller schools being forced to vote additional taxes because of decreasing state funding is in the making. Many of us believe that reorganizing schools for financial purposes on the basis of geography is wrong. . . . We believe that if enough cool heads prevail, we can devise a workable system that will finance smaller attendance while allowing the alleged money saving business practices of larger schools without the mass consolidation of all 293 school districts under 2000 in Ohio."

that those processes conform to the due process requirements of the Fourteenth Amendment.

One of the historic purposes of this Court's certiorari jurisdiction is to assess the compliance of such state action with the procedural demands of the Fourteenth Amendment. And that is precisely why certiorari should here be granted.

2. The undue restrictions placed upon the right to adduce evidence in these administrative proceedings raise an important due process problem under the Fourteenth Amendment.

The root cause of the emergence of the federal due process problem in this case is the judicial approval given the State Board's insistence that due process need only be afforded on the issue of non-compliance with the state educational standards. Because Ohio law so clearly states that the State Board "shall" revoke charters for non-compliance,[8] the State Board has deemed it beyond its power to provide a full due process hearing on issues relating to the arbitrariness and capriciousness of its application of the educational standards and of its use of the revocation sanction.

But query whether the mandatory nature of a sanction to be applied, once an administrative agency has made the requisite adverse fact determination under a controlling rule, justifies cutting off a due process in-

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[8] Section 3310.16 of the Ohio Revised Code provides that the State Board of Education "shall revoke the charter of any school district . . . which fails to meet the standards" prescribed by the Board. As held in *Board of Education of Aberdeen—Huntington Local School District* v. *State Board*, 116 Ohio App. 515, that provision imposes a mandatory duty to revoke for non-compliance. See pp. 3a, 6a, *infra*.

quiry into the possible "misapplication of rules or policies to the facts of particular cases." *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970). By now it is axiomatic that the Due Process Clause of the Fourteenth Amendment imposes a framework of fundamental fairness upon quasi-judicial proceedings conducted by an administrative agency. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304-305 (1937). Such fundamental fairness includes an opportunity to be heard on all relevant issues in a meaningful manner. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And that opportunity would appear to permit something more than the little that was permitted in this case—i.e., a proffer of rejected direct testimony, but no proffer of rejected cross-examination testimony.[9] But no decision of this Court has read an exception into these basic due process rights where a challenge is made to the arbitrariness or capriciousness of a mandatory rule or sanction as applied to a particular case.

Indeed, the mandatory nature of the revocation sanction in this case may well have been a natural breeding ground for arbitrariness in application, making both relevant and meaningful an inquiry into the issue of arbitrariness. The express rejection of any inquiry into the possibility of educational alternatives to revocation heightened the appropriateness of a full inquiry into what *Goldberg* v. *Kelly, supra,* called

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[9] This Court long ago recognized that, in administrative proceedings, "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." *Interstate Commerce Commission* v. *Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913).

the "misapplication of [mandatory] rules or policies to the facts of particular cases." Had such an inquiry been made available, including the right fully to cross-examine the State's witnesses,[10] the petitioners might have been able to prove: (1) that the minimum educational standards had been applied to the two petitioning School Districts on a discriminatory and unreasonable basis; (2) that some invidious and impermissible classification had been used, in the equal protection sense, in singling out these School Districts for application of the educational standards and the resulting revocation sanction; or (3) that some federal law or regulation was violated when the State Board acted, in conjunction with the revocation proceedings, to secure the cut-off of federal vocational training funds to these School Districts.

Putting such matters into the focus of the administrative inquiry would not appear to force a resolution of so-called legislative facts, as opposed to adjudica-

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[10] What this Court said in the criminal law context of *Alford* v. *United States*, 282 U.S. 687, 692 (1931), would appear fully applicable to the importance of cross-examination in an administrative proceeding: "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

tive facts.[11] Since the facts that might have been developed on fuller inquiry pertained to the application of the standards to these particular School Districts, and since those facts would not have been developed in order to attack the legislative policy underlying the standards or the words of the standards themselves, it would appear that only adjudicative matters would be put in issue. As to such matters, of course, the Due Process Clause of the Fourteenth Amendment requires a full hearing. *Goldberg* v. *Kelly, supra.* But to the extent that the ruling below can be said to be premised on the notion that the petitioners sought to develop legislative facts, certiorari becomes appropriate to resolve the confusion attendant upon the adjudicative-legislative distinction. If these matters come within any gray area surrounding that distinction, the gray area should here be explored.

Moreover, when standards are challenged on allegations that their mechanical application may seriously prejudice or impair the substantive rights of parents and their children to receive the benefits of the state

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[11] Perhaps the best statement of the difference between legislative and adjudicative facts is to be found in Professor Davis' *Administrative Law Treatise,* Vol. 1, § 7.02, p. 413 (1958): "Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."

Professor Davis also states at p. 429: "Because the courts have seldom been articulate about the cardinal distinction between adjudicative and legislative facts, the law continues to be unclear and vague concerning minimum procedural requirements with respect to issues of legislative facts."

bounty of education, due process may tilt the balance toward a fuller hearing, even though the parents and children are not directly involved in the administrative hearing. See *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-535 (1925);[12] *Barrows* v. *Jackson,* 346 U.S. 249, 255-258 (1953); *Flast* v. *Cohen,* 392 U.S. 83, 99, n.20 (1968). While education "is not among the rights afforded explicit protection under our Federal Constitution," *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 35 (1973), education of children—together with the property interest in the maintenance of school charters—must be considered a significant and intense interest safeguarded by the procedural requirements of the Due Process Clause. See *Fuentes* v. *Shevin,* 407 U.S. 67, 86 (1972). These School Districts can most effectively represent the due process rights of parents and children with respect to the fair application of minimum educational standards to the schools provided for them, and with respect to the State Board's refusal to provide any educational alternatives to revocation.

Finally, the due process deficiencies adhering to this administrative procedure cannot be said to have been cured by any meaningful or effective judicial review procedure. Cf. *Consolidated Edison Co.* v. *N.L.R.B.,* 305 U.S. 197, 234 (1938); *Bourjois* v. *Chapman,* 301

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[12] In the *Pierce* case, a private parochial school brought suit to enjoin enforcement of a state act on the ground that it violated the constitutional rights of parents and guardians "to direct the upbringing and education of children under their control." No parent or guardian was a party to the suit. This Court held that the school had standing to bring such a suit, the case falling within the rule that injunctions may issue "to protect business enterprises against interference with the freedom of patrons or customers." 268 U.S. at 536.

U.S. 183, 189 (1937). The judicial review was here limited by the Court of Appeals below to determining whether there was substantial evidence to support the virtually conceded conclusion that the two School Districts were in non-compliance with many of the statewide standards.

But at the same time, while conceding that the State Board must apply these standards uniformly throughout Ohio, the Court of Appeals found from the "evidence" presented before the State Board and the Court of Common Pleas that the State Board had not been "unreasonable in applying the minimum standards to the two districts." See p. 5a, *infra*. Such a ruling has a "Catch 22" characteristic. The petitioning School Districts were forbidden to present any meaningful evidence of unreasonableness; yet they have been saddled by the Court of Appeals with the responsibility for not having presented sufficient evidence as to unreasonableness. Such an illusive form of judicial review cannot do service as a substitute for full due process in the administrative hearing.

Here, as in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, 303 (1937), "In Ohio the sole method of review is [to the appropriate state court], which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence

that it approved was unknown and unknowable [and undeveloped]?" [13]

Obviously, the due process problem arising out of these administrative proceedings deserves plenary review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 10, 1974

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[13] It must be repeated that the judicial review that was here available permitted the introduction of additional evidence in court only when the court was "satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." Revised Code of Ohio, § 119.12, and see footnote 3, page 14, *supra*. But most of the evidence that the petitioners here sought to introduce, either by direct or cross-examination at the administrative hearing, could not qualify as newly discovered evidence so as to be admissible on the judicial review proceedings.

APPENDIX

APPENDIX

THE SUPREME COURT OF OHIO
1973 Term

THE STATE OF OHIO, }
City of Columbus. }

To wit: December 7, 1973

No. 73-829

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT ET AL.,
Appellants,

v.

STATE BOARD OF EDUCATION, *Appellee.*

Appeal From the Court of Appeals for Trumbull County

This cause, here on appeal as of right from the Court of Appeals for Trumbull County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

THE SUPREME COURT OF THE STATE OF OHIO
1974 Term

THE STATE OF OHIO, }
City of Columbus. }

To wit: January 18, 1974

No. 73-829

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT, *Appellant,*

v.

STATE BOARD OF EDUCATION, *Appellee.*

Rehearing

Leave to file motion for rehearing out of rule sustained.

It is ordered by the court that rehearing in this case is denied.

COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

Case No. 2081

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT,
Plaintiff-Appellee

v.

STATE BOARD OF EDUCATION, *Defendant-Appellant*

and

Case No. 2082

FARMINGTON LOCAL SCHOOL DISTRICT, *Plaintiff-Appellee*

v.

STATE BOARD OF EDUCATION, *Defendant-Appellant*

Opinion

Dated: July 16, 1973.

HON. GEORGE M. JONES, P. J.
HON. EDWIN T. HOFSTETTER, J.
HON. ROBERT E. COOK, J.

HOFSTETTER, J.:

This matter is on appeal from the decision of the Common Pleas Court reversing the order of revocation by the State Board of Education of the charter of the Bloomfield-Mespo Local School District and the Farmington Local School District. Each of the school districts had separate hearings before the State Board of Education and, though appealed separately to the Common Pleas Court, were consolidated for purposes of the appeal to that Court. The Common Pleas Court's decision, applicable to both school districts, was appealed by the State Board of Education, and, for purposes of the appeal to this Court, were briefed and argued as on one appeal. Additional evidence in Com-

mon Pleas Court was taken under authority of R. C. 119.12. The Common Pleas Court, at time of hearing, indicated it would rule on the admissibility of the additional evidence. This was not specifically ruled on. The opinion, technically not a part of the record, on Page 6 thereof stated it considered the additional testimony. Indirectly, the journal entry, by innuendo, ruled to allow the additional testimony when it said, "This matter was heard upon the record and evidence submitted and briefs filed." (Underlining ours.)

The State Board of Education assigned eleven errors. Essentially, the differences of the parties are best maintained by stating that the appellant relies on the case of Board of Education of Aberdeen-Huntington Local School District, Appellee, v. State Board of Education, Appellant, 116 Ohio App. 515, wherein the Fourth District Court of Appeals reversed this trial court and ruled for the State Board of Education on the following syllabi:

"1. Control of the elementary and secondary schools in Ohio is in the General Assembly, whose actions governing elementary and secondary education are subject only to the limitation imposed by the constitutional prohibition against release of school funds to control of a religious group or sect.

"2. The General Assembly has plenary power in all matters affecting elementary and secondary school education, and such power may be delegated to the State Board of Education so long as the General Assembly retains the right to withdraw such authority.

"3. The provisions of Chapter 3301 of the Revised Code, giving certain powers to the State Board of Education, pursuant to which minimum standards are established for elementary and secondary schools, are constitutional."

On motion to certify, the appeal to the Ohio Supreme Court was dismissed at 174 Ohio St. 321 in 1963 for the reason that no debatable constitutional question was involved.

Appellee school districts herein rely strongly on an unreported decision for the Court of Appeals for Trumbull County, our predecessor Seventh District, wherein the Seventh District majority opinion held, under that fact situation and the statutes then in effect, the standards prescribed by the State Board of Education were unreasonable when considered in the light of facts of noncompliance by ninety-nine per cent of the schools in Ohio.

The Common Pleas Court here, however, on review of the action of the State Board, in its journal entry determined the following:

> "1. The minimum standards adopted by the State in 1968 are reasonable.
>
> "2. The two (2) districts here involved are in violation of said minimum standards.
>
> "3. The application of the minimum standards relative to said violation are unreasonable as they are applied to these districts inasmuch as the State Board of Education has abused its discretion in not providing alternatives to the districts to assure the education of the youth of these districts after revocation."

The appellee districts contended below that the standards are unreasonable, since many schools do not meet all of these standards. The Common Pleas Court pointed out, in its opinion, that the instant case does not contain substantial evidence as to numerous violations of the standards by schools throughout the State of Ohio. We agree. There may have been evidence to that effect in 1966 in the Seventh District case, but there is no similar evidence in the present case. Hence the logic for following that decision, especially in view of Items 1 and 2 as quoted above from the lower court's journal entry, is lost.

We are unable, however, to agree with Item 3 of the lower court's decision, supra. The State Board of Education

must apply the minimum standards, as they exist, uniformly throughout the state. Although capable of exercising some discretion, when all parties agree that compliance of both districts to minimum standards is totally lacking, it would be an abuse of discretion not to apply the standards uniformly. There is no reason, under the standards set up by the Ohio Board of Education, for some students in Trumbull County to enjoy lesser educational advantages than all other areas of the state. Hence the State Board of Education, from the evidence presented, and even when supplemented by the evidence taken in Common Pleas Court, was not unreasonable in applying the minimum standards to the two districts and did not abuse its discretion in not providing alternatives to the districts to assure the education of the youth of these districts after revocation.

For these reasons, we find the lower court erred as to Assignments No. 1, 2, and 3, as the orders of the appellant State Board of Education were supported by reliable, probative and substantial evidence; that said board did not act unreasonably or abuse its discretion in applying its minimum standards to the appellee school districts.

As to No. 4, we find the effect of the orders was not to deprive the pupils of an opportunity for education, but to set the machinery in motion to eliminate the continuance of deprivation of educational rights. Hence this assignment is not well taken.

As to 5 and 6, for reasons already indicated, the Common Pleas Court erred in finding and deciding that the State Board of Education was without authority to revoke the charters unless and until the State Board provided specific alternative plans, and in ordering the State Board of Education to cease and desist from further revocations of the charters of the appellee school districts unless and until the State Board presents specific alternatives to the local boards "relative to the additional needs of the youth of the area."

The lower court erred also in finding and deciding under the terms of R. C. 3301.16 that the appellant State Board of Education was under a mandatory duty to provide a specific plan or plans for the transfers of appellee school districts to one or more adjacent districts before revocation of charters could be ordered. Therefore, Assignment No. 7 is well taken.

Assignment No. 8 states:

> "In ignoring the provisions of section 3311.22, Ohio Revised Code, which grants authority to the Trumbull County Board of Education, and to the electors of the appellee school districts, to propose the transfer of such districts to an adjoining local school district or districts."

This assignment is without merit. In our view, it was not necessary to consider R. C. 3311.22 to properly resolve the issues before the Court of Common Pleas.

Assignment No. 9 also is without merit. The Court's finding that the appellant State Board of Education had failed to exercise leadership in the improvement of public education in the appellee school districts and had failed to render consulting and advisory services to such districts was unecessary, and hence not prejudicial to appellant's rights.

We agree with appellant that, as to Assignment No. 10, the lower court erred in reversing, vacating and modifying the orders of the State Board of Education, contrary to the provisions of section 119.12, Ohio Revised Code, for reasons already noted.

As to Assignment No. 11, and as discussed earlier, under the fact situation attendant to the two cases on appeal, we adopt the holdings of Board of Education of Aberdeen-Huntington Local School District v. State Board of Education, 116 Ohio App. 515, and the appeal thereof, which was dismissed by the Ohio Supreme Court at 174 Ohio St. 321,

as controlling. Therefore, this assignment is also well taken.

For the reasons noted above, we reverse the decision of the Common Pleas Court and remand the cause for further proceedings according to law. Jones, P. J., dissents for reasons stated in Trial Judge's Opinion.

/s/ EDWIN T. HOFSTETTER
Edwin T. Hofstetter
Judge

JONES, P. J., dissents.
COOK, J., concurs.

COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

Case No. 2081

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT,
Plaintiff-Appellee

v.

STATE BOARD OF EDUCATION, *Defendant-Appellant*

and

Case No. 2082

FARMINGTON LOCAL SCHOOL DISTRICT, *Plaintiff-Appellee*

v.

STATE BOARD OF EDUCATION, *Defendant-Appellant*

Journal Entry

The above cases, which were consolidated for hearing before the Court of Common Pleas on appeals under Section 119.12, R.C., from orders of the State Board of Education, came on for hearing before this Court as one appeal. The Court, upon consideration of the appellant's assignments

of error; the evidence adduced before the State Board of Education in each of said cases and the supplemental evidence introduced by appellees before the Court of Common Pleas, the briefs of the parties; and the oral argument of counsel, does now hereby find and decide that in each of said cases:

1. The Court of Common Pleas correctly determined that the minimum standards of education adopted by the appellant State Board of Education in 1968 are reasonable, and that the appellee School District was in violation of said standards.

2. The order of the appellant State Board of Education revoking the charter of the appellee School District was supported by reliable, probative and substantial evidence; and the appellant did not act unreasonably or abuse its discretion in applying its minimum standards to the appellee School District.

3. The Court of Common Pleas erred in finding and deciding that the appellant State Board of Education was without authority to revoke the charter of the appellee School District unless and until the appellant State Board provided specific alternative plans to the local board of education "relative to the educational needs of the youth of the area"; and also erred in ordering the States Board of Education to cease and desist from any further revocation of the charter of the appellee School District unless and until the State Board of Education presented such specific alternative plans to the local board.

4. The Court of Common Pleas erred in finding and deciding that, under the terms of R.C. 3301.16, the appellant State Board of Education was under a mandatory duty to provide a specific plan or plans for the transfer of the appellee School District to one or more adjacent districts before the State Board could order

a revocation of the charter of the appellee School District.

5. The Court of Common Pleas erred in reversing, vacating, and modifying the respective orders of the State Board of Education, contrary to the provisions of Section 119.12, Ohio Revised Code.

6. This Court considers as controlling and adopts the holdings of the decision in *Board of Education of Aberdeen-Huntington Local School District* v. *State Board of Education*, 116 Ohio App. 515, and the appeal thereof, which was dismissed by the Ohio Supreme Court at 174 Ohio St. 321.

WHEREFORE, this Court does now hereby ORDER:

1. The decision of the Court of Common Pleas cancelling and rescinding the respective orders of the States Board of Education revoking the charters of the appellee School Districts and ordering the State Board of Education to cease and desist from any further revocations of such charters, is reversed.

2. This cause is remanded to the State Board of Education for further proceedings according to law.

CONCUR:

EDWIN T. HOFSTETTER, *Judge*
ROBERT E. COOK, *Judge*

DISSENT:

GEORGE M. JONES,
Presiding Judge

Entered, August 13, 1973.

COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Case No. 81992 and 81993

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT

and

FARMINGTON LOCAL SCHOOL DISTRICT, *Plaintiffs*

v.

BOARD OF EDUCATION OF THE STATE OF OHIO, *Defendant.*

Opinion

This is an appeal pursuant to provisions of Section 119.12 of the Revised Code of Ohio entitled the Administrative Procedure Act. This appeal is from a decision of the State Board of Education revoking the charters of the Bloomfield-Mespo Local School District and the Farmington Local School District in Trumbull County for failure to meet minimum standards for Ohio High Schools as revised by the State Department of Education in 1968.

Section 119.12 of the Revised Code which governs this appeal reads in part as follows:

> "The court shall conduct a hearing on such appeal and shall give preference to all proceedings under Sections 119.01 to 19.13, inclusive, of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.
>
> "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the

> court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal."

This section was interpreted by the Supreme Court of Ohio in the case of *Henry's Cafe* v. *Board of Liquor Control,* 170 Ohio St. 233 (1959) relative to the jurisdiction of the Common Pleas Court in an appeal under this section. In that case The Supreme Court stated the following:

> "... Unquestionably, the Court of Common Pleas may reverse, vacate or modify an order of an agency unless it finds that the order is supported by reliable, probative and substantial evidence, but, where is makes such a finding, it can only affirm and cannot reverse, vacate or modify." (page 236)

The question therefore before the court is whether the order of the State Board of Education "is supported by reliable, probative, and substantial evidence and is in accordance with law".

On March the 11th and 12th, 1971, Doyle K. Shumaker, a school supervisor of the State Board of Education, visited the two school districts for purpose of determining whether said schools complied with the standards for Ohio high schools as established by the State Board of Education in 1957 and amended in 1968.

On March 30th, 1971 Mr. Shumaker filed his report with the State Board of Education. On March 31st, 1971, John Brown, Supervisor of Secondary Education for State of Ohio recommended the revocation of these charters by the State Board of Education. On April 12th, 1971, the State Board of Education did revoke the charters of these two school districts for grades 1 through 12 as well as the kindergarten.

Pursuant to a notice a hearing was held relative to said proposed revocation before a referee of the State Board of Education on May 25th and May 26th, 1971. On June 14th, 1971, the State Board of Education ordered that the charters of these schools be revoked pursuant to the recommendation of the referee.

On June the 23rd, 1971, a notice of appeal was filed in the Common Pleas Court setting forth its ground of appeal that the order was not in accordance with law and the standards were not reasonably applied constituting an abuse of discretion.

The appeal is presented pursuant to the provisions of Section 119.12 of the Revised Code referred to as the Administrative Procedure Act.

The decision as to revocation of the charter of both high schools will be considered in this opinion and individual reference to each high school may be made in this opinion as may be indicated.

The background relative to this revocation is necessary for a full determination of this matter. The court at this time will review such facts as presented by counsel in their respective briefs as well as the record that was made before the referee.

In 1963 the Bloomfield-Farmington Schools were examined by Mr. Shumaker of the State Board of Education. At that time he recommended that the State Board of Education follow his recommendation that the charters of these two schools be revoked. Following the action of the State Board of Education an appeal was taken to the Common Pleas Court of Trumbull County and the revocation by the State Board of Education was reversed by that court. The decision of the Common Pleas Court was affirmed by the Court of Appeals for Trumbull County in cases number 1669 and 1670.

In 1969 the State Board of Education had their examiner, David Rossi, return to Trumbull County for the purpose of again reviewing the situation in regards to the education being provided to the students of these districts. Mr. Rossi spent seven months examining the schools in the county, reviewing all the surrounding circumstances, and making a recommendation concurred in by the county board of education. This recommendation relative to a consolidated district of fifteen present school districts was approved by fourteen of the fifteen districts involved. The plan was approved by the County Board of Education and by resolutions of the local board of education and submitted to the State Board of Education on July 14th, 1969.

In order to carry out this consolidation it was necessary that the state advance a substantial part of the financing of the schools needed in this consolidated district. This was necessary since the local districts could raise only a limited amount by taxing themselves to the maximum capacity allowed by law, namely 9 mills.

The State Board of Education never gave an affirmative reply to this proposed consolidation but simply indicated that the districts should consolidate before the state would commit themselves as to an application for state funds. A delegation of 18 people went to Columbus along with the County Superintendent of Schools and the State Inspector, Mr. Rossi.

The plan as submitted and introduced into evidence as plaintiff's Exhibit 1-A was explained for several hours but the only reply from the State Board of Education was a statement made by Dr. Martin Essex, Superintendent of Public Instruction to the effect that the plan should be refined in several respects. There was no definite indication given to the local officials as to just what changes should be made in the plan.

The next action took place on March 11th, 1971, when Mr. Shumaker made his inspection of the two schools for

the sole purpose of determining whether the standards of 1957 and 1968 were met. He ascertained that they had not been met and recommended the revocation of the charter.

In the hearing before the referee when questions were asked relative to alternatives available the referee sustained the objection except to permit such testimony for the very limited purpose of testing the credibility of the witness. This is clearly indicated by the referee throughout the transcript as he felt that he had no authority to consider the matter of alternatives in his ruling in the case.

The state has made general suggestions that there would be three possibilities open to the district if the charters were revoked as follows:

1. Assigning the students to adjoining districts.
2. A consolidation of several districts.
3. Dividing the districts up in various ways.

Nowhere in the records are there specific recommendations as to any one of these three alternatives.

Both of these districts are located in the Northwestern part of Trumbull County. The reports of the high school principals which were marked as board's Exhibit 7 in each of these cases show that at Farmington the number of students in each grade in the high school ranges between 20 and 40 while at the Bloomfield-Mespo the number of students in each grade varies between 24 and 46.

Mr. Shumaker testified at pages 37 through 59 of the Farmington Record that the school was in violation of 43 of the minimum standards and at pages 57 through 80 of the Bloomfield Record the Bloomfield School was in violation of 46 of the minimum standards adopted by the State Board of Education effective July 1st, 1968. The 1968 minimum standards are marked as board's Exhibit 6 in each of these cases.

The districts did not substantially contest or dispute the fact that the violations of the standards existed as testified to by Mr. Shumaker. George Morar, Jr., Superintendent of Trumbull County Schools, testified at page 99 of the Farmington record that in 1969 that district was in violation of the 1968 standards as set forth in board's Exhibit 1.

Lawrence Watkins, Superintendent of the Farmington Local School District testified at page 107 of the Farmington Record that Mr. Shumaker's report is essentially correct and that the Farmington School was in violation of minimum standards in 1969.

Mr. Morar relative to the Bloomfield-Mespo case at pages 132 and 133 also stated that that district was in violation of the state standards of 1968 as enumerated in board's Exhibit No. 1.

The violations are set forth in the finding of facts by the referee filed in each case. Some of the more fundamental violations are set forth in the Appellee's Brief at pages 5 through 7 as follows:

> "Although the minimum standards require that 45 units of instruction be offered, the Bloomfield High School is offering only 28½-units of instruction, and the Farmington School is offering only 30½ units. The Bloomfield High School does not schedule Art although one unit is required, schedules only one unit of Home Economics although three units are required, schedules only two units of Industrial Arts although three are required, and schedules only one-half unit of Music although one is required. The Farmington School schedules only two of the three required units of Home Economics, only two of the three required units of Industrial Arts, and only one-half of the required unit of Music.
>
> "At page 133 of the Record in the Bloomfield case, County Superintendent Morar, when asked whether the pupils of the Bloomfield-Mespo School District are getting the best education possible according to state standards, answered: 'They are not receiving the same

opportunity as other school districts who offer, for example, 45 or more units. In that light I would have to answer no.'

"The uncontested violation of the standards of the Bloomfield School include the failure of three teachers to hold a certificate of provisional grade or higher, the assignment of four teachers to subjects to which they do not hold valid certification, the failure of the principal to hold valid certification for the position, the failure of the person assigned guidance service to have the required semester hours in professional graduate guidance courses, the failure of the school to provide guidance staff in the ratio of one full-time counselor to 400 students. At Farmington the uncontested failures to meet minimum standards include the failure of three teachers to hold a certificate or provisional grade or higher, the assignment of four teachers to subjects to which they do "not hold valid certification, the failure of the principal to hold the valid certification for the position, the failure of the person assigned guidance service to have the required semester hours in professional graduate guidance courses, the failure of the school to provide guidance staff in the ratio of one full-time counselor to 400 students, and the assignment as Librarian of a person having no baccalaureate degree, no college training in Library Science, and no certification.

"Neither Farmington nor Bloomfield have libraries containing the required 5,000 volumes or containing the required periodical titles, and at Farmington the school did not expend the required amount for library books.

"Among the numerous failures of both schools to meet the minimum physical standards are the failure of either school to provide facilities for health services, or to provide a student recovery area, the failure of both schools to provided facilities designed for guidance service, the failure of both schools to provide business machines areas or a drawing room, and the failure of Bloomfield High School to provide any Art facilities.

"Mr. Shumaker testified as to each of the 46 standards which the Bloomfield High School failed to meet, and as to each of the 43 standards which the Farmington High School failed to meet, His testimony was not contradicted in any way, and the Local Boards' own witnesses agree that the standards were not met. It is unquestioned that the orders of the State Board of Education are supported by reliable, probative, and substantial evidence."

At the time of the hearing on this appeal a request was made that additional testimony be presented by the districts as to that of Mr. David Rossi. The court at that time permitted such testimony but deferred the ruling as to whether such testimony would be allowed as part of the record. As it appears that Mr. Rossi was in New York State at the time of the hearing before the referee and therefore was not within this jurisdiction for testimony, the court is of the opinion that good cause has been shown for the presentation of additional evidence under Section 119.12 of the Revised Code and will consider the testimony of Mr. Rossi as part of the record in this case in the determination of these appeals.

David Rossi testified that he is now employed as Director of Education and Planning for a private firm in New York. His work at the present time is organizing plans for schools.

He testified that for the period from 1967 to 1970 he was employed by the State Department of Education and that in 1969 he was assigned to evaluate the schools of Trumbull County. His inspection covered a period of seven months and he worked with the county superintendent of schools.

He testified that he met with local boards before presenting the plan for consolidation of 15 districts and that 14 of the 15 districts had passed resolutions agreeing to the consolidation and that the proposed consolidation was ap-

proved by the county board provided that state funds were made available for the necessary building program in addition to the local funds.

He stated that a meeting was had with Mr. John Brown, Dr. Essex, and the Boards shortly after July the 14th, 1969 and that Dr. Essex indicated the approval of the plan. His testimony was that the additional building would cost 10½ million dollars and that the local boards could provide 4.6 million dollars with funds that were available within the maximum of the 9 mill limitation. He testified that under present law that there can be taxation beyond the 9 mill limitation. His testimony was also that if the millage was beyond 6 mills that it would have to be approved by the state.

He further testified that the State of Ohio has funds under the provision of Chapter 3318 of the Revised Code to help districts in which consolidation is necessary and local funds would not adequately cover a building program. His testimony was to the effect that full consolidation is not possible without state aid.

Mr. Rossi further testified that to consolidate these two districts probably would not be the entire answer as there would still be many deficiencies from the minimum standards.

Mr. Rossi further testified that it probably would not be politically feasible due to economic differences to consolidate all of the districts in Trumbull County into one giant district.

Mr. Rossi further testified that inasmuch as all of the county schools in Trumbull County are pretty well filled it would be hard to say where the students from these two districts could be sent.

He testified that Dr. Essex did not enumerate details as to recommended changes in the proposed consolidation plan.

The State Board of Education in the Brief of the Appellee set forth various alternatives which they state are available to these two districts if the charters are revoked. These are set forth at pages 8 to 10 of the Appellee's Brief and reads as follows:

"In the first place, contrary to the Appellants' assertion, there was no evidence indicating that no other alternative method of education is available to these students. Even without a consolidation of a number of school districts, Mr. David Rossi testified that if the students were sent to the various other schools in Trumbull County, they could be absorbed. In the Bloomfield case, Mr. Morar, in testifying concerning the alternatives facing these schools, in 1969 said that they could raise the money locally and meet the state stadards, an alternative he later said was financially unfeasible, or they could join a larger district and thus meet the state standards or 'they could remain as they were and allow someone else to do this, namely, charter revocation, and either the County Board or the State Board of Education would put them into districts that would be suitable for furthering the education of those children.' (Bloomfield Record page 122) He also testified at page 141 that if Bloomfield-Mespo asked for it, it would be taken into the Maple District. He also testified at pages 141 and 142 that the districts to the northwest, Bloomfield-Mespo, Farmington, Bristol, and Southington could offer a good sound educational program in the near future when funds became available, and one new high school could be built.

"There was testimony concerning a number of types of consolidation which would be educationally satisfactory. None of these possible consolidations has yet taken place.

"One of these was the suggested northern Trumbull County reorganization plan marked as Respondent's Exhibit A in each of these cases, calling for the consolidation of 15 of the northern Trumbull County Townships, and calling for two new high schools, a new elementary school, five junior high conversions,

and 11 expanded elementary schools. The building of that number of new schools would have cost nearly $10,500,000, of which the local community could have paid only $4,600,000. Mr. Morar testified that he was basic author of the plan (Bloomfield Record page 136). It is apparent that Mr. Rossi of the State Board of Education acted only as a consultant and that the plan was in no way a state plan.

"When the plan was informally presented to the State Board of Education, Farmington had not given it any approval and the other school districts involved had agreed in principal only, conditioned upon the assurance of funds from the State Department of Education, although there is no evidence in the Record that the State Department had such funds available.

"When the plan was informally presented to the State Board of Education Dr. Essex suggested that it be refined. Apparently, no more work was done on the plan. Mr. Morar testified at page 131 of the Bloomfield Record that it would be necessary for the school district to consolidate before an application could be made, and at page 130 testified that he was told by the State Board of Education that if the groups did consolidate they would be placed high on the priority. Nevertheless, the schools did not consolidate and no application by a consolidated school district for state funds was ever filed.

"The Record shows that there are other alternatives which would be educationally sound but which have not been tried. Mr. Morar testified at page 136 in the Bloomfield case that if all 16 local school districts in Trumbull County combined, there would be an adequate tax base and no resistence would be found except possibly in two or three of the largest districts, but he testified at pages 137 and 146 (Bloomfield Record) that he had not given much thought to such a possibility and wouldn't recommend such a plan.

"Mr. Rossi testified at page 15 that consolidation of all of the schools under the County Board of Education would be a wonderful thing, and at pages 30 and 31 that a consolidation of the County Schools, either

> including or excluding the City School District, would be educationally feasible although, in his opinion, politically impossible. He also said at pages 37 and 38 that another educationally feasible solution would be some other sort of consolidation which would include several or all of the southern tier townships which are in better financial shape.
>
> "None of these various types of consolidation has been tried, and the extent to which any of them might face political opposition is only a matter of speculation."

The report of the referee at page 3 states that it is not the function of the referee to pass on any legal question with respect to reasonableness of the standards as promulgated or the reasonableness of their application.

The referee in his report concludes that as a matter of law the State Board has the power and authority under Section 3311.16 of the Revised Code to revoke the charter of the respective districts and that under the provisions of this section it is the recommendation of the referee that the charters of both districts be revoked.

ISSUES AND DISCUSSION

1. Are the Standards Adopted By the State Board of Education In 1968 Reasonable

The districts here involved contend that the standards established by the State Board of Education in 1968 which form basis for the proposed revocation of their charter are unreasonable. It is essential to the validity of administrative rules and regulations that they be reasonable. *See Matts v. Curtis Cartage Company,* 132 O.S., 271.

In 1953 the Ohio Constitution was amended to provide for a State Board of Education. Section 3 of that Article states that the powers and duties of the State Board of Education shall be prescribed by law. Section 4 of Article VI provides for a State Board of Education and a Superintendent of Public Instruction.

Pursuant to the constitutional provisions the legislature enacted Section 3301.07 of the Revised Code setting forth the powers of the State Board of Education, Subparagraph D of that section requiring adoption of minimum school standards reads as follows:

> "It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community; the certification of teachers, administrators and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services; admission of pupils and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are certified; requirments for graduation; and such other factors as the board finds necessary."

Section 3301.16 then provides that the State Board of Education "shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board."

It appears from the record that the standards adopted by the State Board of Education in 1968 are in accordance with the provisions of law above quoted.

In the case of *Board of Education of Aberdeen-Huntington Local School District* v. *State Board of Education*, 116 O.A. 515 (1962), decided by the Court of Appeals for Brown County, Judge Radcliff considered the constitutional

background of the 1957 standards and concluded as follows:

> "This brief resume can lead to but one conclusion—that the control of schools, be they public or private, providing elementary and secondary education for the youth of Ohio, reposes in the Legislature of our state. When the General Assembly speaks on matters concerning education it is exercising plenary power and its action is subject only to the limitations contained in the Constitution. An examination of the Constitution reveals that the only prohibition in the Constitution concerning the exercise of this power over elementary and secondary education is as to religion, i.e., the release of public school funds to control by a religious group or sect is prohibited. We can, therefore, indulge in generalities and make a broad statement to the effect that the Legislature of Ohio, in passing laws concerning elementary and secondary schools, is restrained only by its own conscience, fear of the electorate, and one section of the Constitution. See 48 Ohio Jurisprudence (2d), 384, Section 3.
>
> "Pursuant to the directive of paragraph D of Section 3301.07 the State Board of Education directed that minimum standards be established for elementary and high schools within the state. The standards for high schools were published by the State Board of Education and became effective on January 1, 1958.
>
> "In some instances the standards were a paraphrase of the statute, while others were the result of recommendations of experts after gathering the best information available. (There is no attack in this case on the minimum standards as to compliance with Sections 119.01 through 119.04, Revised Code.) These standards are designated as 'minimum' standards, all of which must be met to entitle a school to retain its charter and participate in the distribution of state funds for the maintenance and operation thereof."

The Appellants contention that the standards are unreasonable is primarily based upon the opinion of Judge Jones in cases No. 1669, 1670, 1671, in the Court of Appeals,

Trumbull County heretofore referred to and decided on April 13, 1966. Judge Jones in reviewing the evidence in that case which indicated that only a very small percentage of the schools in the state of Ohio met these standards and stated the following at page 6:

> "The Legislature's intention that the local school districts shall provide for the free education of the youth of such school district is clearly set out in Ohio Revised Code Section 3313.48. When these standards of the State Board are considered in contrast with this statutory obligation, and when it is considered that the students in these school districts will effectively by deprived of a high school education, and when the uncontested facts are that 99% of the schools in the State of Ohio do not meet these standards, it is this Court's belief that these standards are unreasonable."

In the concurring opinion of Judge Lynch in those cases at page 389 he stated the following:

> "I specifically dissent from the majority opinion and the Trial Court's opinion in their statements that the minimum standards of the State Board of Education for high schools prescribed in 1957 are unreasonable."

Judge Lynch at page 392 of the opinion stated that:

> "In my opinion, each minimum standard prescribed by the State Board of Education should be judged on its own merits. I would hold that every one of these minimum standards are desirable goals, but in the case of a high percentage of non-compliance I would hold that it would be unreasonable to revoke a high school charter on the sole ground of violation of such standards. However, even though there might be some question as to the reasonableness of some of these minimum standards, I would hold that this would not affect the validity of the remaining minimum standards."

The Appellants contention is that the standards are unreasonable since many of the schools do not meet all of these standards.

The record in the instant cases does not contain substantial evidence as to numerous violations of the standards by schools throughout the State of Ohio. There was evidence in the cases decided in 1966 to this effect but of course that is not evidence in the present case.

The Court therefore finds that there is no evidence in these cases to establish that the standards as promulgated by the State Board of Education are unreasonable.

2. Do the School Districts In Question Meet the Minimum Standards Promulgated By the State Board of Education In 1968

As previously referred to in this opinion the record is almost undisputed that these school districts do not meet the minimum standards as set forth by the State Board of Education. This is clearly set forth in the testimony of Mr. Doyle Shumaker as well as the testimony of Mr. Morar the Superintendent of Trumbull County Schools as well as the local superintendents of Farmington Local School District. Appellants' counsel in their argument and brief concede that these districts do not meet these minimum standards.

Therefore, it is the finding of the Court that these school districts do not meet the minimum standards promulgated by the State Board of Education in 1968 and are in violation of those standards.

3. Are the 1968 Standards of the State Board of Education Unreasonably Applied In These Cases So As To Constitute An Abuse of Discretion By the State Board of Education

The Appellants' contend that even if the standards are reasonable and have been violated that the State Board of Education is guilty of an abuse of discretion in their application to these districts in that they have failed to provide alternatives to these districts to educate the children

of the district if the revocation of the charter would become effective.

The State Board of Education contends that under the decision of the *Board of Education Aberdeen-Huntington Local School District* v. *State Board of Education* Supra and also in holding of a Common Pleas Court in the case of *Belle Center Local School District* v. *State Board of Education,* Case No. 29264 in the Common Pleas Court of Logan County, that a court cannot consider the matter whether alternatives have been provided in determining whether the revocation by State Board of Education is supported by reliable, probative and substantial evidence.

In the reading of the decision of the Aberdeen-Huntington School District case the court finds that the issue of alternatives was not raised by the local boards and therefore that matter was not decided by the court in that case. It is therefore the opinion of this court that that decision has no effect as to deciding this third issue before the court.

On the other hand, this Court being the Common Pleas Court of Trumbull County is bound by the decisions of the Court of Appeals of Trumbull County. On this subject the previous announcement of the Court of Appeals in Cases number 1669, 1670, and 1671 must be followed by this court in making its decision upon the issue in this case. Judge Jones in his opinion at page 9 stated as follows:

> "Aside from these indications of the unreasonable approach of the State Department of Education, there is a larger, uncontroverted fact that moves this Court to the inescapable conclusion that the action of the State Board of Education in these particular school districts constituted a clear abuse of discretion, and that was the fact that no consideration was given to the effect of this revocation and the fact that consolidation is impossible and education of these students will be discontinued.

"Evidence was clearly submitted that the cost of the building to house a consolidated school would be nearly $1,400,000.00. It was abundantly clear from the evidence that the erection of a new school to handle a consolidated five-township district is financially impossible in that the appraised valuation of the combined real estate in the involved townships would not support a school levy in the amount of $1,400,000.00. This question was not considered nor inquired into in their hasty examinations of these schools; this in spite of the fact that statutory authority is specifically granted to the State Board of Education to conduct studies for possible consolidation by Ohio Revised Code Section 3311.37. Less than eight hours was spent by the State Department of Education and its representatives in determining whether the charter of these schools should be revoked, and no evidence was considered pertaining to the future of these schools should the charters be revoked.

"When such evidence was submitted by the local school districts, it was rejected as being irrelevant. This blindfolded approach is not the approach of a reasonable examiner but rather discloses a tyrannical, arbitrary application of the standards and, accordingly, constitutes an abuse of discretion."

Judge Lynch in his concurring opinion discussed this issue in detail and portions of his opinion starting at page 397 reads as follows:

"Another issue in this case is when there is no question as to the reasonableness of certain minimum standards prescribed by the State Board of Education and a high school is in violation of these minimum standards, does the State Board of Education have the unqualified power to revoke a high school charter irrespective of whether there is any reasonable alternative to provide high school education to the students attending such high school?

"Since the State Board of Education challenged the competency of evidence tending to show that there was no reasonable alternative to provide high school edu-

cation meeting their minimum standards for the students residing within the jurisdictions of the high schools whose charters it seeks to revoke, it appears that its position is that it has the unqualified power to revoke the charter of any high school that does not meet any of its minimum standards irrespective of any reasonable alternative to provide high school education to the students attending such high school.

"This position of the State Board of Education disturbed me more than any other aspect of this case. This position is clearly inconsistent with my understanding of the public policy of the State of Ohio on education as expressed by its Constitutions and Statutes. In my opinion, this position is clearly unreasonable.

"The statutory authority of the State Board of Education to prescribe minimum standards comes from Sections 3301.07 (D) and 3301.16 of the Revised Code.

"Section 3301.07 (D) provides in part as follows:

"D. It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community; the certification of teachers, administrators and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services; admission of pupils, and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are certified; requirements for graduation; and such other factors as the board finds necessary.***."

"Section 3301.16, Revised Code, provides in part as follows:

"Pursuant to standards prescribed by the state board of education as provided in paragraph D of section 3301.07 of the Revised Code, such board shall classify and charter high schools. Such board shall revoke the charter of any high school which fails to meet the standards of high schools as prescribed by the board. In the issuance and revocation of high school charters, the state board of education shall be governed by the provisions of Chapter 119 of the Revised Code. In case a high school charter is revoked, the board of education maintaining such high school shall assign the pupils to an approved high school.***

"The language of Section 3301.16, Revised Code, appears to make it a mandatory duty for the State Board of Education to revoke the charter of any school which fails to meet any standard established by it. Thus, the position of the State Board of Education on this issue seems to have some logic as far as these statutes are concerned.

"However, in my opinion, this interpretation of Section 3301.16, Revised Code, would be contrary to Article I, Section 7, and Article VI, Section 2, of the Ohio Constitution, and would result in Section 3301.16 being unconstitutional.

"Article I, Section 7, of the Ohio Constitution provides in part as follows:

"*** knowledge *** being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, *** to encourage schools and the means of instruction.

"Article VI, Section 2, of the Ohio Constitution provides in part as follows:

"The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools through the State ***.

"It has been held that the leading object and purpose of these constitutional provisions is that the people

of the State of Ohio shall be educated. State, ex rel. Attorney General v. Toledo, 23 O.C.C. 327, at page 349, 30. C.C. (n.s.) 468. See 48 Ohio Jurisprudence (2d) 393-394, Schools, Section 13.

"Thus, the public policy of Ohio as expressed by Article I, Section 7, and Article VI, Section 2, of its Constitution is to encourage education, and the General Assembly is directed to pass laws to establish a thorough and efficient system of common schools in this state. This is a positive duty imposed upon the Legislature. In my opinion, if the result of a statute is to deprive any person of school age of a reasonable opportunity to be educated in this state, it would be in conflict with Article I, Section 7, and Article VI, Section 2, of the Ohio Constitution, and would be unconstitutional.

"Although the constitutionality of the interpretation by the State Board of Education of Section 3301.16, Revised Code, is at issue in this case, I do not believe the constitutionality of Section 3301.16, Revised Code, is at issue. I concur in the decision of Board of Education of Aberdeen-Huntington Local School District v. State Board of Education, 116 Ohio App. 515, in upholding its constitutionality.

"Section 3301.16 and Section 3321.03, of the Revised Code, are consistent with Article I, Section 7, and Article VI, Section 2, of the Ohio Constitution. There is a presumption that the Legislature was aware of these statutes as well as the above-mentioned provisions of the Ohio Constitution when Section 3301.16, Revised Code, was enacted. Therefore, it is logical to conclude that the legislature did not intend to create a situation wherein a revocation of a school charter under Section 3301.16, Revised Code, would make it practically impossible to comply with Sections 3321.03 and 3321.48 of the Revised Code.

"I would hold that the State Board of Education does not have the unqualified power to revoke a high school charter irrespective of whether there is any reasonable alternative to provide high school education to the students attending such high school. Thus, I would hold that the local school boards had the right to raise

the issue that if their school charters were revoked, there was no reasonable alternative to provide high school education for the students residing within their jurisdictions; and any evidence that was relevant and material to demonstrate this issue was competent.

"Another related issue is when a high school is in violation of the minimum standards, does the State Board of Education have any responsibility to provide a reasonable alternative for the high school education of the students residing with the jurisdiction of the high school whose charter is subject to being revoked? It is clear under Section 3301.16, Revised Code, that the primary responsibility is upon the local board of education.

"Apparently, the State Board of Education takes the position that the local board of education has the sole responsibility under these circumstances, and that the State Board of Education has no responsibility.

"Section 3301.07 (B), Revised Code, provides in part as follows:

"*** It (State Board of Education) shall exercise leadership in the improvement of public education in Ohio, ***.

"In my opinion, the above quoted language of Section 3301.07 (B) aptly expresses the public policy of the State of Ohio regarding the primary purpose of the State Board of Education. It is positive rather than negative. The proper function of the State Board of Education is to improve education in Ohio. Section 3301.16, Revised Code, gives the State Board of Education the power to revoke school charters when such schools do not meet the minimum standards, but the exercise of this power is only incidental to the paramount purpose of improving education. When the revocation of a school charter does not serve the purpose of improving education but instead deprives students of existing educational opportunities, the State Board of Education cannot revoke the school charter, as I have previously stated.

"In these cases, the approach of the State Board of Education was negative, namely, it seeks to revoke

the charters of these high schools. When the local school boards raised the issue that there was no reasonable alternative to provide high school education for the students residing within their jurisdictions in the event their school charters were revoked, the State Board of Education disclaimed any responsibility and did not produce any evidence to show the existence of a reasonable alternative to provide a high school education under the circumstances of these cases.

"When counsel for the State Board of Education was asked what would happen to the students attending these high schools if these high school charters were revoked, he did not know.

"The Legislature has enacted statutes to enable the State Board of Education to be of assistance to the local school districts under the circumstances of these cases.

"Section 3311.37, Revised Code, provides in part as follows:

"The state board of education may conduct studies where there is evidence of need for consolidation of contiguous local, exempted village, or city school district or parts of such districts. * * *.

"Sections 3318.01 to 3318.20 of the Revised Code authorizes the State Board of Education to approve applications for state funds from boards of education of a school district for classroom facilities needed to provide a complete educational program when such needs exceed the amount of money that would be available by the issuance of bonds to within approximately nine percent of the total value of all property in the school district.

"Thus, there is evidence in the record that in the event the charters of these high schools are revoked, there is no reasonable alternative to provide high school education to the students presently attending these high schools. The State Board of Education did not respond to this evidence, even though they had the statutory authority to obtain the necessary information and to furnish funds to assist in building a consolidated school in case this was necessary."

These opinions of Judges Jones and Lynch relating to the issue of the reasonableness and the application of the minimum standards and the duty of the State Board to provide alternatives prior to any revocation of a charter is the law of Trumbull County in the 7th District Court of Appeals. As such, this court is required to follow such pronouncements in deciding the cases before it.

The State Board of Education in seeking to revoke the charters of these two schools has taken the uncompromising position that they have an absolute right to revoke the charter of such schools when they do not meet minimum standards without offering any alternatives. Of course, this position is clearly in violation of the ruling of the 7th District Court of Appeals.

In the present case the evidence indicates that these charters were ordered revoked after an examination by Mr. Doyle Shumaker of the State Board over a period of two days. The record excluded any evidence relative to alternatives except as it might relate to credibility. When a plan for consolidation was offered to the State Board of Education their only position was that it should be refined without any specific suggestions as to revising the plan. The State Board made no specific recommendations as to transfer of pupils to other districts in accordance with their student enrollment. The State Board made no recommendation as to transferring parts of the district to other districts. The State Board was of the opinion that the charters should first be revoked and after the two districts had been for all practical purposes dissolved, that other matters relative to educating the students could be determined. This again is in violation of the decision of the 7th District Court of Appeals. The State Board of Education takes a view that the sole responsibility in this regard.

The education of the young people of Ohio is a prime responsibility of all these connected with educational processes from the State Board of Education to the local

boards. The statute recognizes the responsibility of the State Board under authority of Section 3301.07 subsection B which provides:

> "It (State Board of Education) shall exercise leadership and the improvement of public education in Ohio consulting and advisory services in such manner shall be provided by the Board to the school districts in the State."

The State Board's position in these cases apparently disregard the authority of the statute in this regard as to the State Board taking a position of leadership. It would appear to this Court that with the huge technical assistance available to the State Board and the vast resources of funds available to the state that the State Board would in this case take a position of leadership in seeking to assist these two boards in providing alternatives to improve education of the youth in this area. For some unknown reason, the State Board of Education has repeatedly refused to accept this leadership in the instant cases.

Counsel for the boards indicated in their arguments and briefs as well as in the record that the citizens of this area want to improve the educational facilities of their youth but they are limited due to a lack of technical assistance and the lack of necessary funds and the availability of raising the necessary funds for a building program. Under these conditions and the willingness of the citizens of this area to cooperate the State Board of Education should take a position of leadership to assist these citizens in improving the educational facilities for the youth in the northernpart of Trumbull County.

As to Issue No. 3, the Court finds that the application of the minimum standards and the violation by the districts involved are unreasonable as they are applied to these districts in that the State Board of Education has failed to provide necessary alternatives after revocation and that

this constitutes an abuse of discretion by the State Board of Education.

In conclusion it is the holding of the Court as follows:

No. 1 That the minimum standards adopted by the State in 1968 are reasonable.

No. 2 That the two districts here involved are in violation of said minimum standards.

No. 3 That the application of the minimum standards relative to said violation are unreasonable as they are applied to these districts inasmuch as the State Board of Education has abused its discretion in not providing alternatives to the districts to assure the education of the youth of these districts after revocation.

The Court would note that under the ruling herein made that if the State Board of Education would seek to revoke these charters at a later date and if they provide specific alternatives to the board relative to the education of the youth of these districts and give those districts a reasonable period of time to decide as to which alternative they wish to follow, that such procedure then would be proper and that such action of the State Board would be upheld in that case.

However, considering the record before the Court, the Court is of the opinion that in view of the holding of this Court as heretofore set forth that the State Board's decision of revocation of the charters of these two districts is not supported by reliable, probative and substantial evidence and that the order of revocation of the State Board of Education as to these two districts be cancelled and rescinded and held for naught and that the State Board of Education cease and desist from any further revocation until specific alternatives have been presented to the local boards of education relative to the educational needs of the

youth of the area and a reasonable period of time given to the board to determine which alternative they will follow.

Counsel for the local boards will prepare a journal entry consistent with the above ruling of the Court.

/s/ WILLIAM AMMER
Judge William Ammer
By Assignment

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BEFORE THE BOARD OF EDUCATION

In the Matter of

Bloomfield-Mespo Local School
District [Trumbull County],

Respondent.

The above-entitled matter was heard on May 25, 1971, before the undersigned as Referee designated by the Ohio State Board of Education [hereinafter referred to as the "State Board"] pursuant to the provisions of Section 119.09, Revised Code.

Upon the hearing the Respondent was represented by counsel. No objection was made to the admission of the Board's Exhibits 1 through 5 which established the jurisdictional grounds for this proceeding, including proper notice to the Respondent [R. 2, 3].

The subject matter of the proceeding was to determine upon hearing whether or not pursuant to Section 3301.06, Revised Code of Ohio, the charter of the Respondent District should be revoked by reason of its alleged violation of certain of the minimum standards for high schools as established by the State Board pursuant to the provisions of Section 3301.07(D). The authority for the State Board to conduct these proceedings for revocation is contained in Section 3301.16, Revised Code of Ohio, as amended, which provides in pertinent part as follows:

> "Pursuant to standards prescribed by the state board of education as provided in division (D) of section 3301.07 of the Revised Code, such board shall classify and charter school districts and individual schools within each district. Such board shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board. * * *."

At the outset, it would appear that the Respondent did not seriously contest the violations of the high school standards upon which the State Board grounded its proposed revocation [Board's Exhibit 1] and as disclosed by an examination and visitation of the Bloomfield High School by the Chiefs of Secondary Education and Special Services of the Department of Education on March 16 and 17, 1971. In this connection, the following remarks of counsel are pertinent [R. 1]:

> "MR. GRIFFITH: I would merely make comment as to what our contentions are so that it might be helpful. We don't seriously content that the Bloomfield Mespo School District meets all of the standards established by the State Board of Education. We recognize that there are some that we are absolute deficient in; however, we contend that the standards are unreasonable and that the standards are unreasonably applied. It will be to that that we will direct our evidence and our attention in the presentation of our case."

Under these circumstances it is the position of this Referee as follows:

1. The standards have been established by the State Board pursuant to the provisions of the Administrative Procedure Act and such establishment and promulgation by the State Board amounts to a finding by such Board that the standards are reasonable.

2. That for the purposes of this hearing and by reason of his appointment by the State Board, this Referee is bound by determinations as previously made by such Board.

3. That consequently it is not the function of this Referee to pass upon any legal question with respect to the reasonableness of the standards as promulgated or the reasonableness of their application.

On both cross-examination and direct examination the Respondent attempted to elicit evidence to the effect that there are other schools in the county or state who might at the present time fail to meet one or more of the standards. Evidence was also offered with respect to a proposed reorganization plan which involved the Respondent District as well as others.

This Referee did not consider that such evidence was material to the issues in this proceeding. The evidence is, however, in the record if by no other means than a proffer, to which proffer the Respondent was entitled for record purposes pursuant to the provisions of Section 119.09, Revised Code of Ohio. It was and is the position of this Referee that his function is confined to the factual determination as to whether or not the standards have been violated and the legal determination as to whether or not upon such factual findings the State Board has the power and authority to revoke the charter of the District involved. Parenthetically, it might be added that the record does not appear to contain, by way of proffer or otherwise, any expert testimony on the issue of the reasonableness of the standards or the manner of their application.

Findings of Fact

It is found that the following standards for high schools were not met by Bloomfield High School as of the date of visitation by the representatives of the Department of Education.

Standard	Section	
EDb-403-01	S	The chorus class does not meet the required clock hours for the credit assigned.
	Z	The records of teacher in-service education participation have not been maintained.
EDb-403-02	B	The scheduled curriculum in the school, including vocational training opportunities, is not comprehensive.
	C	The school is scheduling and operating only 28½ units in separately scheduled classes [45 units are required].
	C-1	The school does not schedule art [one unit is required].
	C-5	The school schedules only one unit of home economics [three units are required].
	C-6	The school schedules only two units of industrial arts [three units are required].
	C-8	The school schedules only one-half unit of music [one unit is required].
	O	The library does not serve as the major instructional resource center of the school.
EDb-403-03	B	The guidance program is not coordinated by a qualified school counselor.
EDb-403-04	D	There are three teachers who do not hold a certificate of provisional grade or higher.
	E	There are four teachers assigned subject for which they do not hold valid certification.
	G	The principal does not hold a valid certificate for the position.

STANDARD	SECTION	
	H	The person assigned guidance service does not have the required semester hours in professional graduate guidance courses.
	I	The school does not provide guidance staff in the ratio of one full-time counselor to 400 students.
EDb-403-05	A	The instructional materials and equipment are inadequate in several curricular areas.
	D	The library does not have the required 5,000 volumes.
	G	The school library does not have the required periodical titles.
EDb-403-08	D	The facilities are neither adequate nor designed to meet the needs of the educational program.
	I	The library does not meet the student station requirement.
	I-4	The library does not provide for an enclosed conference area.
	I-5	The library does not provide an office and workroom.
	I-6	The library does not have provisions for storage of back issues of periodicals.
	I-7b	The library does not provide appropriate facilities for listening and viewing activities.
	I-7c	The library does not provide adequate display space.
	J, J-1, J-2, J-3	The school does not provide an instructional materials center with provisions for review, conference, storage, maintenance and production facilities.
	K	The school does not provide facilities designed for guidance services.

STANDARD	SECTION	
EDb-403-08	K-3	There are no provisions for a reception area.
	L	The school does not provide facilities for health services.
	L-4	The school does not provide a student recovery area.
	M	The school does not provide an adequate administrative office facility.
	O	The school does not provide adequate facilities for art, business education, home economics, music, physical education and science.
	Q, Q-1, Q-2 Q-3, Q-4 Q-5, Q-6 Q-7, Q-8	The school does not provide art facilities.
	S-1	There is no business machines area.
	T	The home economics laboratory facilities are not adequate to implement the instructional program.
	W-3	The industrial arts facilities do not include a finishing room.
	W-5	The industrial arts facilities do not include a planning area.
	W-6	The industrial arts facilities do not include a drawing room.
	W-13	The industrial arts facilities do not include a dust removal system.
	X	There are no designed facilities to implement the music program.
	Y-1	The small group instruction and practice area is inadequate.
	AA-7	The physical education locker rooms and lockers are inadequate.

STANDARD	SECTION	
EDb-403-08	AA-9	The physical education facilities do not provide facilities for staff.
	BB	The science facilities are not adequate to implement the instructional program.
	CC-4	The science facilities do not have a preparation room.
	CC-7	The science facilities do not provide an adequate exhaust system.

CONCLUSIONS OF LAW

It is concluded and submitted as a matter of law that the State Board has the power and authority under Section 3301.16, Revised Code of Ohio, to revoke the charter which is the subject of this proceeding.

RECOMMENDATIONS

Under what this Referee considers to be the statutory mandate imposed upon him by Section 3301.16, as amended, supra, it is recommended that the charter which is the subject of this proceeding be revoked.

Respectfully submitted,

/s/ WILLIAM A. CARROLL
William A. Carroll,
Referee.

BEFORE THE BOARD OF EDUCATION OF OHIO

In the Matter of
Farmington Local School
District [Trumbull County],

Respondent.

The above-entitled matter was heard on May 26, 1971, before the undersigned as Referee designated by the Ohio State Board of Education [hereinafter referred to as the "State Board"] pursuant to the provisions of Section 119.09, Revised Code.

Upon the hearing the Respondent was represented by counsel. No objection was made to the admission of the Board's Exhibits 1 through 5 which established the jurisdictional grounds for this proceeding, including proper notice to the Respondent [R. 2, 3].

The subject matter of the proceeding was to determine upon hearing whether or not pursuant to Section 3301.06, Revised Code of Ohio, the charter of the Respondent District should be revoked by reason of its alleged violation of certain of the minimum standards for high schools as established by the State Board pursuant to the provisions of Section 3301.07(D). The authority for the State Board to conduct these proceedings for revocation is contained in Section 3301.16, Revised Code of Ohio, as amended, which provides in pertinent part as follows:

> "Pursuant to standards prescribed by the state board of education as provided in division (D) of section 3301.07 of the Revised Code, such board shall classify and charter school districts and individual schools within each district. Such board shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board. * * *"

At the outset, it would appear that the Respondent did not seriously contest the violations of the high school standards upon which the State Board grounded its proposed revocation [Board's Exhibit 1] and as disclosed by an examination and visitation of the Farmington Local School District by the Chiefs of Secondary Education and Special Services of the Department of Education on March 11 and 12, 1971. In this connection, the following remarks of counsel are pertinent [R. 1]:

> "MR. GRIFFITH: I would only say, by way of explanation, that the Respondent expects to show that the standards are unreasonable as promulgated by the State Board of Education and revised in 1968 and they have been unreasonably applied in the particular application to Farmington Local School District, and our evidence will go to that proof."

Under these circumstances it is the position of this Referee as follows:

1. The standards have been established by the State Board pursuant to the provisions of the Administrative Procedure Act and such establishment and promulgation by the State Board amounts to a finding by such Board that the standards are reasonable.

2. That for the purposes of this hearing and by reason of his appointment by the State Board, this Referee is bound by determinations as previously made by such Board.

3. That consequently it is not the function of this Referee to pass upon any legal question with respect to the reasonableness of the standards as promulgated or the reasonableness of their application.

On both cross-examination and direct examination the Respondent attempted to elicit evidence to the effect that there are other schools in the county or state who might at the present time fail to meet one or more of the standards. Evidence was also offered with respect to a proposed

reorganization plan which involved the Respondent District as well as others.

This Referee did not consider that such evidence was material to the issues involved in this proceeding. The evidence is, however, in the record if by no other means than a proffer, to which proffer the Respondent was entitled for record purposes pursuant to the provisions of Section 119.09, Revised Code of Ohio. It was and is the position of this Referee than his function is confined to the factual determination as to whether or not the standards have been violated and the legal determination as to whether or not upon such factual findings the State Board has the power and authority to revoke the charter of the District involved. Parenthetically, it might be added that the record does not appear to contain, by way of proffer or otherwise, any expert testimony on the issue of the reasonableness of the standards or the manner of their application.

Findings of Fact

It is found that the following standards for high schools were not met by Farmington Local School District as of the date of visitation by the representatives of the Department of Education.

Standard	Section	
EDb-403-01	R	The art class is not scheduled the required clock hours for the credit assigned.
	S	The band class does not meet the required clock hours for the credit assigned.
	Z	The records of teacher in-service education participation have not been maintained.
EDb-403-02	B	The scheduled curriculum, including vocational training opportunities, is not comprehensive.
	C	The school is scheduling and operating in separately scheduled class only 30¼ units [45 units are required].
	C-5	The school schedules only two units of home economics [three units are required].

STANDARD	SECTION	
	C-6	The school schedules only two units of industrial arts [three units are required].
	C-8	The school schedules only one-half unit of music [one unit is required].
	O	The library does not serve as the major instructional resource center of the school.
EDb-403-03	B	The guidance program is not coordinated by a qualified school counselor.
EDb-403-04	D	There are three teachers who do not hold a certificate of provisional grade or higher.
	E	There are four teachers assigned subjects for which they do not hold valid certification.
	G	The principal does not hold a valid certificate for the position.
	H	The person assigned guidance service does not have the required semester hours in professional graduate guidance courses.
	I	The school does not provide a guidance staff in the ratio of one full-time counselor to 400 students.
	J	The person assigned as librarian has no Baccalaureate Degree, no college training in library science and no certification.
	M	Not all teachers have the required planning or conference time.
EDb-403-05	A	The instructional materials and equipment are inadequate in several curricular areas.
	D	The library does not have the required 5,000 volumes.
	E	The school did not expend the required amount for library books.

STANDARD	SECTION	
	G	The school library does not have the required periodical titles.
EDb-403-08	D	The facilities are neither adequate nor designed to meet the needs of the educational program.
	I-4	The library does not provide for an enclosed conference area.
	I-5	The library does not provide an office and workroom.
	I-7b	The library does not provide appropriate facilities for listening and viewing activities.
	J, J-1, J-2, J-3	The school does not provide an instructional materials center with provisions for review and conference, storage, maintenance and production facilities.
	K	The school does not provide facilities designed for guidance services.
	K-3	There are no provisions for reception and display areas.
	L	The school does not provide facilities for health services.
	L-4	The school does not provide a student recovery area.
	M-2	The school does not have adequate provisions for an office for the principal.
	O	The school does not provide adequate facilities for art, business education, home economics, industrial arts, and music.
	P	The school does not provide adequate art facilities.
	S-1	There is no business machines area.
	T	The home economics laboratory facilities are not adequate to implement the instructional program.

STANDARD	SECTION	
	U-9	The home economics facilities do not include a fitting area.
	V	The industrial arts laboratory is not designed or appropriate to implement the instructional program.
	W-1	The industrial arts facilities do not include adequate project storage.
	W-6	The industrial arts facilities do not include a drawing room.
	W-13	The industrial arts facilities do not include a dust removal system.
	X	There are no designed facilities to implement the music program.
	Y-1	There are no small group instruction and practice areas for music.
	AA-7	The school does not provide adequate girls' locker room facilities.

CONCLUSIONS OF LAW

It is concluded and submitted as a matter of law that the State Board has the power and authority under Section 3301.16, Revised Code of Ohio, to revoke the charter which is the subject of this proceeding.

RECOMMENDATIONS

Under what this Referee considers to be the statutory mandate imposed upon him by Section 3301.16, as amended, supra, it is recommended that the charter which is the subject of this proceeding be revoked.

Respectfully submitted,

/s/ WILLIAM A. CARROLL
William A. Carroll,
Referee.

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Whether the Due Process Clause of the Fourteenth Amendment is violated in a state administrative proceeding, wherein the Petitioner local public school districts contested revocation of their state school charters for noncompliance with minimum state educational standards, by the referee's refusal to permit cross-examination of the Respondent's witnesses concerning alleged noncompliance with the standards by other local school districts where (a) Petitioners failed to proffer any such evidence from their witnesses on direct examination, (b) the record is devoid of any abuse of discretion or arbitrary enforcement of minimum state educational standards, and (c) noncompliance with minimum educational standards by other school districts is irrelevant in the administrative proceedings.	
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In The
Supreme Court of the United States

October Term, 1973

No. 73-1686

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT
and
FARMINGTON LOCAL SCHOOL DISTRICT

Petitioners,

v.

STATE BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY, OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the Supreme Court of Ohio dismissing the appeal to that court as of right for the reason that

no substantial constitutional question existed therein, and the order overruling Petitioners' motion to order the Court of Appeals to certify the record are set forth in the appendix attached hereto at p. 1a.

The unreported opinion and journal entry of the Court of Appeals, Eleventh Appellate District, Trumbull County, Ohio are set forth in the Petition at pp. 2a and 7a, respectively.

The unreported opinion of the Court of Common Pleas, Trumbull County, Ohio is set forth in the Petition at p. 10a.

The two unreported findings and recommendations of the Referee of the State Board of Education are set forth in the Petition at pp. 36a and 43a.

JURISDICTION

Respondents submit that for the reasons set forth in Part I, Reasons For Denying the Writ, *infra* at p. 8, Petitioners have improperly sought a writ of certiorari addressed to an intermediate state appellate court, and this Court is therefore without jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment is violated in a state administrative proceeding, wherein the Petitioner local public school districts contested revocation of their state school charters for noncompliance with minimum state educational standards, by the referee's refusal to permit cross-examination of the Respondent's witnesses concerning alleged noncompliance with the standards by other local school districts where (a) Petitioners failed to proffer any such evidence from their witnesses on direct examination, (b) the record is devoid of any abuse of discretion or arbitrary enforcement of

minimum state educational standards, and (c) noncompliance with minimum educational standards by other school districts is irrelevant [redacted] in the administrative proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Ohio Revised Code, Section 119.09, Administrative Procedure Act:

"The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing."

Ohio Revised Code, Section 119.12, Administrative Procedure Act:

". . . Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the court. . . ."

"Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency. . . ."

"The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law."

Ohio Revised Code, Section 3301.07:

"The state board of education shall exercise under the acts of the legislature general supervision of the system of public education in the state of Ohio. In addition to the powers otherwise imposed on the state board under the provisions of law, such board shall have the following powers:

(A) It shall exercise policy forming, planning and evaluative functions for the public schools of the state . . .

(B) It shall exercise leadership in the improvement of public education in Ohio . . .

(D) It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality . . ."

Ohio Revised Code, Section 3301.16:

"Pursuant to standards prescribed by the state board of education as provided in division (D) of section 3301.07 of the Revised Code, such board shall classify and charter school districts and individual schools within each district. Such board shall revoke the charter of any school district or school which fails to meet the standards for elementary and high schools as prescribed by the board. In the issuance and revocation of school district or school charters, the state board of education shall be governed by the provisions of Chapter 119, of the Revised Code. In case a school district charter is revoked pursuant to this section, the state board of education may dissolve the school district and transfer its territory to one or more adjacent districts. . . ."

STATEMENT OF THE CASE

After a hearing, the Respondent State Board of Education revoked the charters of the Petitioner local school districts for failure to comply with the minimum educational standards for high schools as prescribed by the State Board pursuant to R. C. Section 3301.07. The grounds for revocation were that Petitioner Bloomfield-Mespo failed to meet 46 minimum standards and Petitioner Farmington failed as to 43 such standards. Petitioners admit that such findings were substantiated. Petition, p. 9. The orders of revocation were to become effective on June 30, 1971.[1]

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[1] Respondent feels compelled to point out a basic fallacy in Petitioners' Statement of the Case. Petitioners suggest that these proceedings began in 1963, but in fact these proceedings began in May, 1971 as clearly appears from the record. Throughout this litigation Petitioners have wrongly labored under the basic misconception that the present proceedings were somehow a continuation of the 1963 case. This misconception was not only factual but also of a legal nature.

In 1967, R. C. Section 3301.16 was amended, the effect of which was to render inoperative the 1966 decision of the Seventh Ohio Appellate District (the predecessor of the Eleventh District) in *Bristol Local School District* v. *Board of Education*. Nos. 1669-1671 (June 16, 1966), a matter of state law recognized and accepted by all of the courts reviewing this matter. Additionally, new state minimum educational standards were adopted in 1968. Indeed, the record in the 1971 proceedings rendered the earlier *Bristol* decision inapplicable, as was specifically found by the Court of Common Pleas (Petition, p. 25a) and the Court of Appeals:

> "The appellee districts contended below that the standards are unreasonable, since many schools do not meet all of these standards. The Common Pleas Court pointed out . . . that the instant case does not contain substantial evidence as to numerous violations of the standards throughout the State of Ohio. We agree. There may have been evidence to that effect in 1966 in the [Bristol] case, but there is no similar evidence in the present case. Hence the logic for following that decision . . . is lost." Petition, p. 4a.

Petitioners appealed the orders of revocation to the Trumbull County Common Pleas Court pursuant to R. C. Section 119.12, wherein each Petitioner asserted in its notice of appeal that the order was "not supported by reliable, pertinent or substantial evidence, is not in accordance with law" and "constituted an abuse of discretion." The notices of appeal are reprinted in the appendix hereto, at pp. 2a, 3a.

The Court of Common Pleas, after a hearing permitting Petitioners to introduce additional evidence, found the state minimum educational standards to be reasonable; that Petitioners were in violation of the standards; but that the application of the standards was unreasonable because the State Board had not provided alternative plans for the operation of the district prior to revocation of the charters. Petition, p. 35a. The Court then enjoined Respondent from revoking the charters "until specific alternatives have been presented to the local boards."

The Respondent State Board appealed to the Court of Appeals, Eleventh Appellate District, Trumbull County, Ohio, which court reversed the decisions of the Common Pleas Court. The Court of Appeals held that the 1968 minimum state standards were reasonable, that Petitioners were in violation thereof, that the revocation order was supported by reliable, probative and substantial evidence, and that the standards had been properly applied because R.C. Section 3301.16 did not require the State Board to provide a specific plan of transfer or consolidation prior to revoking a school charter for noncompliance with minimum state standards. Petition, p. 8a. The Court of Appeals said in its opinion that:

> "Although capable of exercising some discretion, when all parties agree that compliance of both districts to minimum state standards is totally lacking, it would be an abuse of discretion not to apply the standards uniformly. There is no reason, under the standards . . . for some students in Trumbull County

to enjoy lesser educational advantages than all areas of the state . . . ."

Petition, p. 5a.

Upon reversal, the Court of Appeals remanded to the State Board of Education for further proceedings.

Petitioners sought review by the Supreme Court of Ohio by motion to order the Court of Appeals to certify its record[2] and by appeal as of right.[3] In their Memorandum in Support of Claimed Jurisdiction, Petitioners for the first time raised the federal constitutional claims which they now assert in this Court, together with several state constitutional claims. On December 7, 1973, the Supreme Court of Ohio overruled Petitioners' motion to certify and dismissed the appeal as of right for the reason that "no substantial constitutional question exists herein." Both orders are reprinted in the appendix hereto, at p. 1a. Petitioners' motion for rehearing was overruled on January 18, 1974. (Petition, p. 1a).

On April 5, 1974, Petitioners requested a 60 day extension of time to apply for a writ of certiorari to the Supreme Court of Ohio alleging that the opinion of the Court of Appeals indicated that these proceedings "involve important federal constitutional questions." After Respondent objected to such delay, Petitioners again stated in their Reply that the constitutional issues did not emerge until after the decision of the Court of Appeals.

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[2] Article IV, § 2(e), Constitution of the State of Ohio, gives the Supreme Court of Ohio jurisdiction to review any case certified by a court of appeals pursuant to Article IV, § 3(B)(4).

[3] Article IV, § 2 of the Constitution of the State of Ohio provides:

"(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals *as a matter of right* in the following:

(iii) Cases involving questions arising under the constitution of the United States or of this state." [Emphasis supplied.]

REASONS FOR DENYING THE WRIT

I. Petitioners have improperly sought a writ of certiorari addressed to an intermediate state appellate court, rendering this Court without jurisdiction under 28 U.S.C. § 1257 (3)

Petitioners seek review under 28 U.S.C. § 1257 (3) of the judgment and opinion rendered herein by an intermediate state appellate court. This is plainly incorrect, where as here, the highest state court has reviewed and decided this cause. In *Van Huffel* v. *Harkelrode*, 284 U.S. 225 (1931), this Court held that where the Supreme Court of Ohio dismissed an appeal as of right on the ground that no debatable constitutional question was involved, a petition for a writ of certiorari to the intermediate Ohio appellate court would not lie and that the only decision which could be reviewed on certiorari was the decision of the Supreme Court of Ohio.[4]

Petitioners themselves say that the Ohio Supreme Court, wherein Petitioners first raised the federal constitutional claims asserted here, "considered and rejected" those claims on the merits. Petition, pp. 16-17. Respondent respectfully submits that if any judgment can be reviewed herein, it is the judgment of the Ohio Supreme Court and not the Court of Appeals for Trumbull County wherein Petitioners concede that no federal constitutional issues were raised or decided. Thus, Petitioners' request for a writ of certiorari should be denied.

II. Petitioners lack standing to raise the federal constitutional claims asserted.

This Court has often held that one subdivision of a state government does not have standing to allege the

[4]The *Van Huffel* decision reaffirmed the rule announced in *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1926). A writ of certiorari is properly addressed to the Ohio Supreme Court when it is that court's judgment which is to be reviewed regardless of which lower court may possess parts of the record. *See Burns* v. *Ohio*, 360 U. S. 252 (1959).

deprivation of federal constitutional rights by another subdivision of the same state government. *See, e.g., Williams* v. *Baltimore,* 289 U.S. 36 (1933); *Trenton* v. *New Jersey,* 262 U.S. 182 (1923). Here, all parties are subdivisions of state government but at different levels. The State Board of Education is a subdivision of state government by virtue of the state constitution.[5] The petitioning local school districts are also subdivisions of state government, but they exist by virtue of a charter from the State Board pursuant to law.[6]

Petitioners seek to raise a federal constitutional claim arising out of an attempt by the State Board to restructure two noncomplying school districts with the purpose of providing a general education of high quality to students in northern Trumbull County. As state government subdivisions themselves, however, Petitioners have no standing to contest such action because Petitioners are not "persons" within the meaning of the Fourteenth Amendment.[7]

Petitioners' reliance upon *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), to give them standing is completely

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[5] Article VI, § 4 of the Constitution of the State of Ohio.

[6] R. C. Section 3301.16, *supra* at p. 4.

[7] Federal due process rights cannot be asserted by one state government subdivision against another when the former is either altered or done away with. The only issue is whether the alteration was made in compliance with state law. *Laramie County* v. *Albany County,* 92 U.S. 307 (1876); *Risty* v. *Chicago, R.I. & P.Ry,* 270 U.S. 378, 390 (1926); *Baker* v. *Carr,* 369 U.S. 186, 290, n. 23 (1962) (Frankfurther, J., dissenting).

In *Smith* v. *Indiana,* 191 U.S. 138 (1903), it was established that a petitioner seeking a writ of error to a state court must have a *personal* interest in the litigation and not simply an *official* interest. *See also County Court of Braxton County* v. *West Virginia,* 208 U.S. 192 (1908). This concept is also followed in Ohio. *State, ex rel. Hostetter* v. *Hunt,* 132 Ohio St. 568, 9 N. E. 2d 676 (1937). In the instant case, petitioners have no personal interest to assert.

unfounded. Petitioners have ignored the obvious distinguishing factor – in *Pierce*, the petitioner was a *private* corporation operating a *private* school, and the Court accorded it standing to protect its "business enterprise." To the contrary, Petitioners here are *public* School districts which exist by virtue of *state law*.

The Petitioners' complete lack of standing serves to place this controversy in proper perspective as a local dispute between two state government subdivisions as to the best way to educate students in the public schools of Ohio,[8] a dispute which cannot be adjudicated in this Court.

III. Petitioners failed to raise any federal constitutional issues in a timely and appropriate manner.

Petitioners assert a deprivation of federally guaranteed due process rights on the ground that they were not permitted to adduce evidence at the administrative hearing as to the allegedly arbitrary enforcement of minimum state school standards.[9] The Petition repeatedly states that the local school districts could not have raised this issue until review by the Supreme Court of Ohio. Here, Petitioners have a basic misconception of the law. Respondent respectfully submits that Petitioners failed to properly and timely raise the asserted federal constitutional claims at their first opportunity, which was of course, on their appeal from the administrative decision of the State Board of Education to the Court of Common Pleas pursuant to R. C. Section 119.12.

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[8] Contrary to what Petitioners appear to urge upon the Court at pp. 17-20 of the Petition, the record is completely silent as to the merits of small versus large or decentralized versus centralized schools. In any event, such issues are matters of state educational concern and irrelevant here.

[9] As discussed at Part IV, *infra*, this allegation is without foundation in the record.

The notices of appeal filed pursuant to R. C. Section 119.12 to the Trumbull County Court of Common Pleas, pp. 2a and 3a, *infra*, noticeably lack any reference to a claim that Petitioners were denied due process because they were not given an opportunity to proffer testimony or to cross-examine witnesses. Moreover, Petitioners' Brief in the Court of Common Pleas does not include a single reference to any federal constitutional claims.

Petitioners' total failure to raise any federal constitutional issue in a timely manner renders this Court without jurisdiction in this matter. *Bailey* v. *Anderson*, 326 U.S. 203, 206-207 (1945). Indeed, the Supreme Court of Ohio's dismissal for want of a substantial constitutional question could well have been grounded upon any of several adequate state grounds, including Petitioners' failure to raise any federal constitutional claim before their appeal to the Supreme Court of Ohio,[10] or upon the equally valid state ground that one subdivision of state government cannot raise federal constitutional deprivations in a case against another such subdivision.[11]

Additionally, Petitioners did not assign any errors of federal constitutional dimensions by way of cross-appeal

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[10] *Hamlin* v. *McAlpin Co.*, 175 Ohio St. 517, 196 N.E.2d 781 (1964); *Clarington* v. *Althar*, 122 Ohio St. 608, 174 N.E. 251 (1930). This adequate state ground also explains the overruling of Petitioners' Motion for Rehearing.

The party attempting to invoke this Court's jurisdiction has the burden of making an affirmative showing by the record that the federal question was properly raised, so that the failure of the state court to deal with it in precise terms cannot be considered as grounded upon want of proper presentation. *Street* v. *New York*, 394 U.S. 576 (1969); *Bailey* v. *Anderson*, 326 U.S. 203 (1945). Petitioners admit that they failed to raise any federal constitutional question until their appeal to the Supreme Court of Ohio and cannot now be excused for their total failure to raise the issue at the proper time.

[11] *State, ex rel. Hostetter* v. *Hunt*, 132 Ohio St. 568, 9 N.E.2d 676 (1937).

from the decision of the Court of Common Pleas, even though that court found the minimum state educational standards to be reasonable and properly applied except in that alternative plans had to be offered before revocation of Petitioners' charters.[12]

Under the holding in *Stembridge* v. *Georgia*, 343 U.S. 541 (1952), the action of the highest state court in refusing, without an opinion, to hear a case on appeal precludes review on writ of certiorari by this Court where the federal constitutional issues were not timely raised under state procedure. Even "when the question of the existence of an adequate state ground is debatable," this Court is without jurisdiction in such instances. *Stembridge*, 343 U.S. at 547-548. Here, of course, there are several readily apparent adequate state grounds for the decision of the Supreme Court of Ohio dismissing Petitioners' appeal as of right.

IV. Petitioners were afforded a full and fair hearing with the opportunity to be heard and to cross-examine witnesses.

Petitioners were afforded a full and fair hearing in every respect. This case is completely unlike the cases cited by Petitioners at p. 21. Unlike *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), where individual welfare recipients were afforded no hearing before termination of benefits, the Petitioner school districts were afforded notice and a full hearing. Unlike *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), these Petitioners were given notice of the hearing. And unlike *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937), these Petitioners have no complaint regarding action taken solely on the basis of administrative notice. The mere fact that Petitioners can

[12]The Supreme Court of Ohio does not rule upon any question presented unless the record certified by the court of appeals discloses that the issue was presented by appeal or by cross-appeal and passed upon by the intermediate appellate court. *See, e.g., Presley* v. *Norwood*, 36 Ohio St. 2d 29, 303 N.E.2d 81 (1973); *Winslow* v. *Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947).

only cite such clearly distinguishable cases indicates the weakness of their position.

Petitioners have attempted to urge a federal constitutional claim based upon the referee's refusal to allow Petitioners to cross-examine Respondent's witness as to the number of other schools not in full compliance with minimum state standards. However, Petitioners cannot deny that they were given the opportunity to proffer such testimony on direct examination of their own witnesses. Petitioners obviously failed to make their own case, if they in fact had a case. The record is quite clear that Petitioners failed upon direct examination to offer any evidence of noncompliance by other schools, by proffer or otherwise.[13]

In any event, and entirely aside from the evidentiary deficiency in the record to support Petitioners' claims here, evidence of noncompliance of other schools was not relevant evidence in the administrative proceeding. Violation of valid standards by some schools does not excuse compliance with the standards by all other schools.[14]

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[13]R.C. Section 119.09 specifically provides that upon objection the party offering evidence shall make a proffer for the record.

The referee concluded in his report that:

> "[T]he record does not appear to contain, by way of proffer or otherwise, any expert testimony on the issue of the reasonableness of the standards or the manner of their application." Petition, pp. 38a, 45a.

The Court of Common Pleas said:

> "The record . . . does not contain substantial evidence as to numerous violations of the standards by schools throughout the State of Ohio." Petition, p. 25a.

The Court of Appeals agreed that there was no substantial evidence in the record of violations by other schools. Petition, p. 4a.

[14]In the leading Ohio case on this precise issue, *Board of Education of Aberdeen-Huntington Local School District* v. *State Board*, 116 Ohio App. 515, at 521 (1962), *appeal dismissed for want of a debatable constitutional question*, 174 Ohio St. 321 (1963), the court concluded that "the doctrines of substantial compliance or comparative compliance with the minimum standards do not apply" where a school fails to meet over 20 minimum educational requirements.

V. This case does not involve any substantial federal constitutional issues.

Despite Petitioners' strained attempt to present this case as one of nationwide import, the record and the governing law clearly establish that this case involves only a dispute between two local school districts and the State Board of Education as to the best method of improving the quality of education available to students residing in two school districts in the northern part of Trumbull County, Ohio.[15] The Ohio Constitution and the laws prescribed thereunder charge the State Board with the responsibility for providing a general education of high quality. The state law contemplates a large degree of cooperation between the local school district and the State Board but clearly gives the State Board the higher authority where the local district fails to meet minimum standards.

This Court has said that education, although a most important benefit provided by a state, is not a federal constitutional right, *San Antonio School District* v. *Rodriquez*, 411 U.S. 1, 35 (1973), and that a state "always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). The Constitution of the State of Ohio places the responsibility for public education in the Respondent State Board. The state legislature has charged the State Board with the responsibility for providing a general education of high quality to all students and has provided the Board with the statutory authority to adopt and enforce minimum state standards to ensure the intended result in all areas of the state.

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[15]Even if one could find some support in the record for Petitioners' assertion that the State of Ohio is attempting to consolidate small, rural school systems, Respondent respectfully suggests that the Petitioners themselves admit that this Court "is not the forum . . . to evaluate the educational merits of Ohio's program." Petition, p. 19.

The Court of Appeals decision herein captured the very essence of the importance of having a state board to ensure compliance with minimum state educational standards throughout the state:

> "There is no reason, under the standards set up by the Ohio Board of Education, for some students in Trumbull County to enjoy lesser educational advantages than all others in the state. . . ."
>
> "[T]he effect of the [revocation] orders was not to deprive the pupils of an opportunity for education, but to set the machinery in motion to eliminate the continuance of deprivation of educational rights." Petition, p. 5a.

Throughout this litigation Petitioners have sought to save their charters at the expense of the quality of education available to pupils who attend their schools. Everyone agrees that Petitioners have not met minimum standards.[16] The only dispute goes to the procedure under state law which must be followed to correct the educational deficiencies existing in the Petitioners' schools. Respondent respectfully submits that this state law issue has been conclusively decided by the courts of the State of Ohio, and only regrets that the needed improvement of the educational opportunities for the affected school children has been so long delayed by this litigation.

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[16] At the Bloomfield-Mespo hearing before the referee, counsel for the Petitioners stated:

> "We don't seriously contend that the Bloomfield-Mespo School District meets all of the standards . . . We recognize that there are some that we are absolutely deficient in." Petition, p. 37a.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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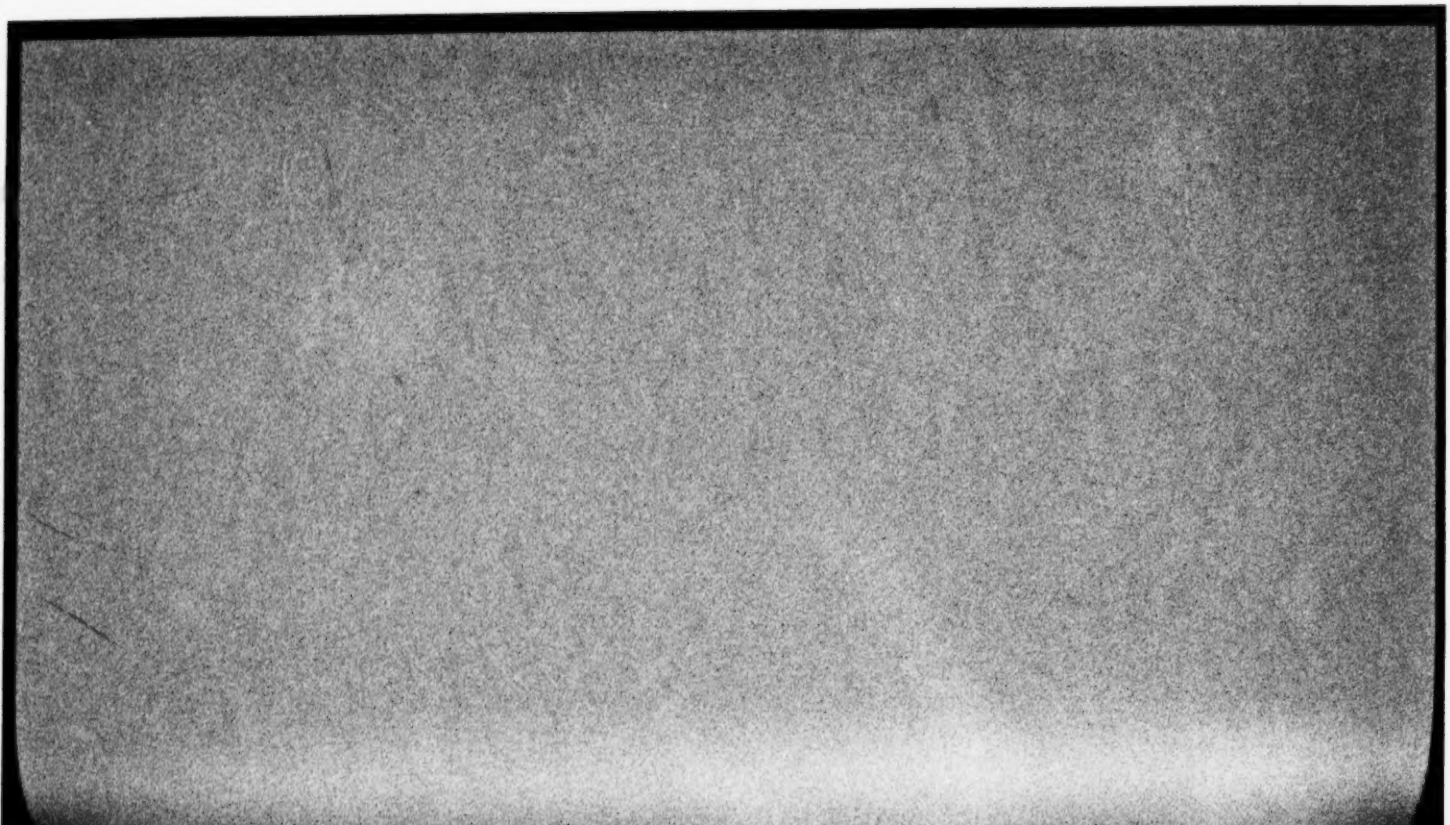
May 31, 1974

APPENDIX



APPENDIX

THE SUPREME COURT OF OHIO
1973 Term

THE STATE OF OHIO, City of Columbus. } To wit: December 7, 1973

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT ET AL.,
Appellants,
vs.
STATE BOARD OF EDUCATION,
Appellee.

No. 73-829
Appeal From the Court of Appeals for Trumbull County

This cause, here on appeal as of right from the Court of Appeals for Trumbull County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

THE SUPREME COURT OF OHIO
1973 Term

THE STATE OF OHIO, City of Columbus. } To wit: December 7, 1973

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT ET AL.,
Appellants,
vs.
STATE BOARD OF EDUCATION,
Appellee.

No. 73-829
Motion for an Order Directing the Court of Appeals for Trumbull County To Certify Its Record

It is ordered by the Court that this motion is overruled.

COURT OF COMMON PLEAS

TRUMBULL COUNTY, OHIO

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT

Plaintiff

vs.

BOARD OF EDUCATION OF THE STATE OF OHIO

Defendant

No. 81992

Notice of Appeal

The Bloomfield-Mesop [sic] Local School District hereby gives notice of its intention to appeal to the Common Pleas Court of Trumbull County the resolution of the Ohio State Board of Education passed at its meeting on June 14, 1971 revoking the charter of the Bloomfield-Mespo Local School District, Trumbull County.

The grounds of appeal are that the order is not supported by reliable, pertinent or substantial evidence, is not in accordance with law and the actions of the State Board of Education in issuing said order constituted an abuse of discretion.

Respectfully submitted.

BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT

By /s/ LYNN B. GRIFFITH

Lynn B. Griffith
Attorney for Plaintiff

COURT OF COMMON PLEAS

TRUMBULL COUNTY, OHIO

FARMINGTON LOCAL SCHOOL DISTRICT

Plaintiff

vs.

BOARD OF EDUCATION OF THE STATE OF OHIO

Defendant.

No. 81993

Notice of Appeal

The Farmington Local School District hereby gives notice of its intention to appeal to the Common Pleas Court of Trumbull County the resolution of the Ohio State Board of Education passed at its meeting on June 14, 1971 revoking the charter of the Farmington Local School District, Trumbull County.

The grounds of appeal are that the order is not supported by reliable, pertinent or substantial evidence, is not in accordance with law and the actions of the State Board of Education in issuing said order constituted an abuse of discretion.

Respectfully submitted.

FARMINGTON LOCAL SCHOOL DISTRICT

By /s/ LYNN B. GRIFFITH

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